United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7108 corrected

To Be Argued By:

Martin Kleinbard

United States Court of Appeals

For the Second Circuit

PIERRE J. LELANDAIS & CO., INC., PIERRE J. LELANDAIS, RESEARCH & SCIENCE INVESTORS, INC., INTERCONTINENTAL TECHNOLOGY & NATIONAL RESOURCES, CORONET FUND and CREATIVE CAPITAL FUND,

Plaintiffs-Appellees,

vs.

MDS-ATRON, INC. and MOHAWK DATA SCIENCES CORP.,

Defendants-Appellants,

and

JOSEPH S. STOUTENBURGH and RICHARD L. KARPEN,

Defendants.

On Appeal from the United States District Court

For the Southern District of New York

[redacted] BRIEF ~~OF~~ FOR DEFENDANTS-APPELLANTS MDS-ATRON, INC. AND MOHAWK DATA SCIENCES CORP.

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TABLE OF CONTENTS

	Page
Preliminary Statement	1
Statement of Issues	2
Statement of Facts	3
Defendants-Appellants	4
The Merger	6
Plaintiffs-Appellees	7
Plaintiffs' Theories And The District Court's Decision	9
Summary Of Argument	11
ARGUMENT:	
I. Plaintiffs Have Not Proved They Suffered Any Damages As A Result Of Anything That Defendants Did Or Did Not Do And, In Any Event, The District Court Applied Erroneous Standards In Measuring Damages	14
A. The Applicable Theory Of Damages	14
B. Plaintiffs Failed To Prove They Were Damaged	17
C. The Fair Cash Value Of Atron Stock On April 30, 1971	19
1. The Proper Measure Of The Fair Cash Value Of Atron Stock	19
2. The District Court's Attempt To Measure The Fair Cash Value Of Atron Stock	19
3. Defendants Should Not Have Been Estopped From Showing That Atron Stock Was Not Worth $8.60 Per Share On April 30, 1971	21

Page

(a) Estoppel Is An Inapplicable Doctrine 21

(b) The Effect Of The Estoppel, If Applicable, Was Improperly Calculated 23

(i) March 12 Is An Irrelevant Date 23

(ii) Mohawk Stock Should Not Have Been Valued By Reference To Its Market Price On Any Single Day 24

(iii) Mohawk Made No Cash Offer 24

4. Actual Fair Cash Value Of Atron Stock 26

(a) Actual Net Asset Value of Atron 26

(b) Actual Investment (Or Earnings) Value of Atron 28

(c) Actual Market Value Of Atron 31

D. The Value Of Mohawk Stock On April 30, 1971 33

1. The District Court's Calculation 33

2. The Errors In The District Court's Calculation 34

E. Conclusion On Damages 40

II. The Information Omitted From The Proxy Statement Was Not Material And, In Any Event, The District Court Applied An Erroneous Standard In Determining Materiality 41

A. The Correct Standard Of "Materiality" In § 14(a) Cases 41

B. The Data Not Disclosed In The Proxy Statement 44

	Page
1. The Change Of The Fiscal Year	45
2. The Cessation Of Sales Of Leased Equipment To Unaffiliated Third Parties	45
3. The Change From The Financing Method To The Operating Method Of Accounting For Sales Of Leased Equipment To Unaffiliated Third Parties	47
(a) The Leidesdorf Recommendation	50
(b) The Status Of Hengen	51
(c) The Disclosures Of The May 4 Press Release	51
(d) The Magnitude Of The 1970 Income Restatement	52
4. Miscellaneous Adjustments	53
C. In The Context Of Atron's Grave Condition, None Of The "Omitted Data" Was Material	55
III. The District Court Erred In Holding That Reliance Was Not An Issue In This Case; The Evidence Shows That Plaintiffs Would Have Acted No Differently Had The Omitted Information Been Disclosed	59
A. Reliance Should Have Been Considered An Element Of The Case	60
B. The District Court's Error Was Prejudicial	62
CONCLUSION	67

TABLE OF AUTHORITIES

A. Cases — Page

Adams v. R.C. Williams & Co., 39 Del. Ch. 61, 158 A.2d 797 (1960) 30

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) 42, 59

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) 18

Bragalini v. Biblowitz, F. Supp. , CCH Fed. Sec. L. Rep., ¶ 94,371 (S.D.N.Y. 1974) 43,47,55

Brown v. Hedahl's-Q B & R, Inc., 185 N.W.2d 249, 48 A.L.R.3d 414 (N.D. Sup. Ct. 1971) 19

Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir.), cert. denied, 414 U.S. 910, 924 (1973) 43,55,60,61

Competitive Associates, Inc. v. Laventhol, Krekstein, Horwath & Horwath, No. 74-2048 (2d Cir. May 8, 1975) 60

Crosley Corp. v. United States, 229 F.2d 376 (6th Cir. 1956) 22

Dickinson v. Fire Ass'n, 378 Pa. 396, 106 A.2d 607 (1954) 25

Estate Counseling Serv., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 303 F.2d 527 (10th Cir. 1962) 15

Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544 (E.D.N.Y. 1971) 49

General Time Corp. v. Talley Indus., Inc., 403 F.2d 159 (2d Cir. 1968), cert. denied, 393 U.S. 1026 (1969) 42

Cases (cont.) Page

Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973) 42

Girard v. Gill, 261 F.2d 695 (4th Cir. 1958) 22

Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969) 36

Helvering v. Brooklyn City Ry., 72 F.2d 274 (2d Cir. 1934) 22

Jackson v. Oppenheim, F. Supp. , CCH Fed. Sec. L. Rep., ¶ 94,894 (S.D.N.Y. 1974) 43, 60

Lanza v. Drexel & Co., 479 F.2d 1277 (2d Cir. 1973) 41

List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.), cert. denied, 382 U.S. 811 (1965) 41

Matter of Behrens, 61 N.Y.S.2d 179 (Sup. Ct. N.Y.Co., 1946), aff'd sub nom., Matter of Standard Coated Prods. Corp., 271 App. Div. 1007, 69 N.Y.S.2d 910 (1st Dep't 1947) 28

Matter of Fulton, 257 N.Y. 487, 178 N.E. 766 (1931) 28

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 42, 59

Pearlstein v. Scudder & German, 346 F. Supp. 443 (S.D.N.Y. 1972) 57

Republic Technology Fund, Inc. v. Lionel Corp., 483 F.2d 540 (2d Cir. 1973), cert. denied, 415 U.S. 918 (1974) 41, 43

Cases (cont.) | Page

Rochez Bros. v. Rhoades, 491 F.2d 402 (3rd Cir. 1974) 61

Root v. York Corp., 29 Del. Ch. 351, 50 A.2d 52 (1946) 28

Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974) 43

SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969) 55

Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974) 60

Simon v. New Haven Board & Carton Co., F.2d , CCH Fed. Sec. L. Rep., ¶ 95,015 (2d Cir. 1975) 18, 19

United States v. United Airlines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962), modified on other grounds sub nom., United Airlines v. Wiener, 335 F.2d 379 (9th Cir. 1963), cert. dismissed, 379 U.S. 951 (1964) 21

B. Statutes, Rules, Regulations

Securities Exchange Act of 1934

Section 10(b), 15 U.S.C. § 78j(b) 41, 43

Section 14(a), 15 U.S.C. § 78n(a) 41-43, 59-61

Section 28(a), 15 U.S.C. § 78bb(a) 36, 39

Federal Rules of Civil Procedure

Rule 8(c) 21

Rule 52(a) 41

Statutes, Rules, Regulations (cont.) | Page

Federal Rules of Evidence, Rule 301 62

20 Minn. Stat. Ann. §§ 301.40, 301.44 15

C. Statutory Material

Conf. Comm. Notes, House Report No. 93-1597, 93rd Cong., 2d Sess. (1974) 62

D. Secondary Authority

Annot., 48 A.L.R.3d 430 (1973) 26

15 Fletcher, Cyclopedia of Corporations, § 7165.4, (1973 rev. ed.) 24, 28

Note, 79 Harv. L. Rev. 1453 (1966) 24, 28

1 Williston, Contracts, § 139 (3d ed. 1954) 22

Restatement (Second) of Contracts, § 90 (Tent. Draft No. 2, 1965) 22

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RESEARCH & SCIENCE INVESTORS, INC., INTERCONTINENTAL
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On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR DEFENDANTS-APPELLANTS MDS-ATRON, INC.
AND MOHAWK DATA SCIENCES CORP.

Preliminary Statement

This is an appeal by defendants-appellants MDS-Atron, Inc. and Mohawk Data Sciences Corp. from a judgment entered after trial without a jury by the United States District Court for the Southern District of New York (Brieant, J.) dated January 8, 1975*

* The judgment is in fact dated January 8, 1974, but this is a typographical error.

(A. 971)* in favor of plaintiffs Pierre J. LeLandais & Co., Inc., Pierre J. LeLandais, Research & Science Investors, Inc., Coronet Fund and Creative Capital Fund, awarding each of them damages in different amounts against defendants-appellants, together with interest at six percent from April 30, 1971. The findings and conclusions of the District Court are reported at 387 F. Supp. 1310 (S.D.N.Y. 1974) and reprinted in the Appendix at A. 910 through A. 970.**

Statement of Issues

1. Whether the District Court erred in determining that plaintiffs had suffered any compensable damages?

2. Whether the District Court erred by failing correctly to apply the appraisal method for determining the "fair cash value" of plaintiffs' Atron stock as of April 30, 1971?

3. Whether the District Court erred in determining that the fair cash value of plaintiffs' Atron stock on April 30, 1971 was $8.60 per share?

4. Whether the District Court erred in determining that defendants were "estopped" to deny that the fair cash value of plaintiffs' Atron stock on April 30, 1971 was $8.60 per share?

5. Whether the District Court erred in determining that the value of Mohawk stock to plaintiffs on April 30, 1971 was $21.50 per share (or $5.38 per Atron share)?

6. Whether the District Court erred by applying an improper standard of "materiality"?

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* Unless otherwise indicated, all page references are to the Appendix ("A.") on this appeal.
** Plaintiffs have filed a Notice of Cross-Appeal. See pp. 10-11, *infra*.

7. Whether the District Court erred in determining that the information omitted from the proxy statement was material?

8. Whether the District Court erred in determining that defendants should have disclosed in the proxy statement information which was not yet ripe for disclosure?

9. Whether the District Court erred in determining that "reliance" was not an issue in this case?

10. Whether the District Court erred in permitting plaintiffs to recover damages under Section 14(a) of the Securities Exchange Act of 1934 even though the record establishes that the information omitted from the proxy statement would not have altered the decision of plaintiffs to vote their stock in favor of the merger?

Statement of Facts

This action arises from the merger on April 30, 1971 of Atron Corporation ("Atron") into defendant MDS-Atron, Inc. ("MDS-Atron"), a wholly-owned subsidiary of defendant Mohawk Data Sciences Corp. ("Mohawk"), pursuant to which Atron's former stockholders received one share of Mohawk common stock for every four shares of Atron.* Five of the six plaintiffs were part of an overwhelming majority of Atron stockholders who voted in favor of the merger.

The District Court held that five of these six plaintiffs are entitled to recover a total of $164,431.40 in damages

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* Except as otherwise indicated, the term "defendants" shall be used throughout this brief to refer to defendants-appellants Mohawk and MDS-Atron.

from the two corporate defendants, Mohawk and MDS-Atron, on the ground that such plaintiffs were misled by the omission of certain material information concerning Mohawk from the proxy statement relating to the merger.*

This appeal is taken to correct the errors of law and fact, regarding the issues of both liability and damages, upon which the District Court's decision is based. In addition, the appeal is taken because there remains pending in the District Court, before Duffy, J., a class action, which has been stayed pending determination of this case, brought on behalf of most of the remaining former stockholders of Atron, representing potentially some 800,000 shares, against the same defendants, seeking damages on the same claims asserted in this action. Oscar Gruss & Sons v. MDS-Atron, Inc., et al., 75 Civ. 32 (KTD). Thus, a decision adverse to defendants on this appeal would affect that class action. While the judgment of $164,431.40 in this case is itself a substantial sum, there is, in reality, a much greater amount, perhaps millions of dollars, involved on this appeal.

Defendants-Appellants

Mohawk was and is engaged in the design, development, manufacture and sale and rental of a variety of computer equipment. As set forth in the proxy statement, on July 31, 1970, Mohawk had assets of $129,434,000 and a total stockholders' equity of $46,562,000. Mohawk common stock, of which some

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* The amended complaint was dismissed as against the two individual defendants, one (Karpen) an officer-director of both Mohawk and Atron, and the other (Stoutenburgh) an officer-director of Atron.

5,483,591 shares were then outstanding (A.560; Pl. Ex. 18 p.11), was and is listed for trading on the New York Stock Exchange (A.912; 387 F. Supp. at 1314).

In April 1971, Atron was a relatively new, small computer company which had been struggling for survival since its organization in November, 1968. In January 1970, Atron made its one and only public stock offering, selling precisely 300,000 shares of its common stock (A.916; 387 F. Supp. at 1315). Earlier, through private placements, it had sold nearly 800,000 shares of restricted stock (A.54-57; Pre-Trial Order pp. 6-9). Mohawk was the largest single investor in Atron; together with its pension trust, Mohawk owned nearly 20% of Atron (Id.). Such trading in Atron stock as occurred was confined to the over-the-counter market (A.556; Pl. Ex. 18 p. 7).

Atron commenced actual operations in 1969. It had one principal customer -- Mohawk, which was responsible for 90% of Atron's sales. The District Court, with only slight exaggeration, referred to Mohawk as Atron's "sole" customer (A.922; 387 F. Supp. at 1318). Even with Mohawk's considerable business, however, Atron was unprofitable throughout its brief life. In its first financial statement, for the fiscal year ended September 30, 1970, Atron showed an operating loss of $1,298,945 on total operating income of $895,483 (A.561; Pl. Ex. 18 p.12). In the quarter ended December 21, 1970, Atron suffered an additional net loss of nearly $150,000.* Indeed, Atron was enduring

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* Since the bulk of Atron's capital was in cash, it had considerable interest income (A.561; Pl. Ex. 18 p. 12); therefore, its <u>operating</u> loss for the last quarter of 1970 was necessarily substantially greater than the $150,000 net loss reported.

monthly operating losses of $200,000 (A.442, 453; Tr. 410, 421) which the District Court found continued during the months immediately prior to its April 30, 1971 merger into Mohawk (A.914-15; 387 F. Supp. at 1315).

The Merger

Atron's limited resources and continuing operating losses were serious problems. Its most serious danger, however, was its dependence upon one customer, Mohawk; and, in January 1971, Atron learned that it was about to lose that customer. At that time, Joseph F. Stoutenburgh, president of Atron, was advised that Mohawk intended to exercise its contractual right to assume the manufacture for itself of Atron's single most significant product (A.420; Tr. 388).

At this juncture, Atron sought a way out of its predicament. The answer was a merger. While Atron had taken some exploratory steps in the past looking to a merger, nothing had come of such efforts (A.312, 314-15; Tr. 268, 270-71). However, on January 29, 1971, the presidents of Atron and Mohawk met and concluded a merger negotiation. They agreed that a Mohawk/Atron merger would be mutually attractive. They also agreed that the merger should be effected by an exchange of stock in a ratio of one share of Mohawk for every four shares of Atron, a fair approximation of the then prevailing market price of the stocks of the two companies (A.205-08; Tr. 138-41). This agreement was immediately disclosed to the public in a press release (A.496-97; Pl. Ex. 14).

The January 29 agreement in principle was thereafter reduced to writing and formally ratified by Mohawk's Board of Directors on March 2, 1971 (A.539-43); Pl. Ex. 16). The agreement was dated "as of" March 12, 1971 (A.498; Pl. Exh. 15).

On April 16, 1971, a proxy statement containing what the District Court described as "all of the usual materials needed in order to permit consideration of a corporate merger" (A.944; 387 F. Supp. at 1324) was printed and mailed to Atron stockholders. Under the law of Minnesota, where Atron was incorporated, an affirmative vote of two-thirds in interest of all Atron stockholders was necessary to approve the merger; the actual vote on April 30 was 924,756 in favor of the merger, only 3,600 against (A.61; Pre-Trial Order p. 13).

As was also detailed in the proxy statement, under Minnesota law, a dissenting stockholder, voting against the merger proposal and following certain prescribed steps, would have been entitled to obtain an appraisal of the "fair cash value" of his Atron stock, and then to obtain such value in cash, instead of Mohawk stock, in exchange for his Atron stock. Not one Atron stockholder sought such appraisal rights (A.61; Pre-Trial Order p. 13).

Plaintiffs-Appellees

Each of the six plaintiffs was an early investor in Atron. Together, they held 58,834 shares of restricted Atron stock; none held any unrestricted Atron stock.

The one individual plaintiff, Pierre J. LeLandais ("LeLandais") was an investment banker and stockbroker (A.912;

387 F. Supp. at 1314). He was well-known to Atron and, in turn, knew it well. LeLandais had helped to organize the initial financing for Atron; he had, for a brief period, served as an Atron director (A.58-59; Pre-Trial Order pp. 10-11). LeLandais had been responsible for bringing in most, if not all, of the other plaintiffs as Atron investors. He was however, no longer so intimately involved; as the District Court stated,

> "Personal bitterness existed between LeLandais and [Atron's president] Stoutenburgh, and each held the other in low esteem because of an unrelated matter." (A.937; 387 F. Supp. at 1322).

Plaintiff Pierre J. LeLandais & Co., Inc. was an investment company which the District Court held might be treated as the "alter ego" of LeLandais himself (A.911; 387 F. Supp. at 1314). Plaintiff Research & Science Investors, Inc. ("RSI") was a venture capital fund. Plaintiff Coronet Fund and Creative Capital Fund, both partnerships, were also venture capital funds, run by professional money managers (A.912; 387 F. Supp. at 1314). Plaintiff Intercontinental Technology & Natural Resources, S. A. ("ITNR")* was a Luxembourg corporation and foreign investment fund, which had become the beneficial owner of certain Atron stock originally purchased by RSI (A.911-12; 387 F. Supp. at 1314). The District Court correctly categorized all plaintiffs as "sophisticated," "experienced and knowledgeable investors"

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* ITNR was inadvertently misidentified below as Intercontinental Technology and <u>National</u> Resources, S.A.

(A.912, 917; 387 F. Supp. at 1314, 1315).*

Plaintiffs' Theories and the District Court's Decision

In May 1972, more than one year after the merger, the six plaintiffs brought this action against Mohawk, MDS-Atron, Stoutenburgh and Richard L. Karpen ("Karpen"), a director of both Mohawk and Atron at the time of the merger. The complaint proffered two distinct theories:

(1) The first, and the one primarily emphasized by plaintiffs throughout the case, was the so-called "free stock deception" claim. In essence, plaintiffs argued that they had been induced to favor the proposed merger by a promise that they would receive unrestricted Mohawk stock in exchange for their restricted Atron stock. Plaintiffs based such belief, they said, upon the proxy statement itself and upon express oral representations made by Stoutenburgh to LeLandais.

Instead, holders of restricted Atron stock received restricted Mohawk stock upon the merger. However, on May 26, 1971, all such investors were advised that Mohawk would register their stock if requested to do so (A.62; Pre-Trial Order p. 14). Five of the six plaintiffs so requested, and their Mohawk stock was registered effective August 25, 1971 (A.63; Pre-Trial Order p. 15).**

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* Except as otherwise indicated, as used in this brief, the term "plaintiffs" refers to all of the above-identified plaintiffs except ITNR, whose claims were rejected by the District Court because ITNR did not vote on the merger proposal (A.962; 387 F. Supp. at 1331).

** ITNR made no such timely request and its Mohawk stock was not registered.

The District Court unequivocally rejected plaintiffs "free stock deception" theory, finding that

> ". . . if any of these plaintiffs drew the inference [from the proxy statement] which they say they did, it was entirely unwarranted, and may not be a basis for fastening liability on defendants." (A.930; 387 F. Supp. at 1320)

Further, the District Court found LeLandais' testimony about the alleged oral representations by Stoutenburgh to be "incredible" (A.933; 387 F. Supp. at 1321).*

(2) Plaintiffs, however, prevailed against the corporate defendants on their secondary theory: that material information was omitted from the proxy statement. The details of such alleged omissions are discussed in Point II, infra. It is sufficient here to note that the alleged material omissions related to such insignificant information as the fact that Mohawk had decided, but not disclosed, prior to April 30, 1971, the date of the Atron stockholders' meeting and merger with Mohawk, to change its fiscal year from one ending on July 31 to one ending on April 30.

The District Court dismissed all claims against the two individuals whom plaintiffs named as defendants. As to Stoutenburgh, the court found that he had never been properly served and, thus, personal jurisdiction was lacking (A.963; 387 F. Supp. at 1331). As to Karpen, the dismissal was on the merits, based upon a finding that Karpen

> ". . . showed affirmatively to my satisfaction that his conduct was free of wrongdoing." (A.963; 387 F. Supp. at 1331)

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* Plaintiffs' Notice of Cross-Appeal recites that they are appealing from "those portions of the district court's findings of fact and conclusions of law" which rejected their "free stock" deception theory.

Thus, no individual was held liable for the alleged wrongful acts for which the two corporate defendants have been adjudged liable.

The court below also dismissed the claims of plaintiff ITNR. ITNR did not vote either way on the merger, because the record holder of its Atron stock failed to forward to it the proxy material in a timely fashion (A.919, 962; 387 F. Supp. at 1317, 1331). Thus, the District Court found, if ITNR were "damaged" at all, it was damaged as a result of its failure "to get the word" concerning the impending merger, and not as a result of anything contained or not contained in the proxy statement (A.919, 962; 387 F. Supp. at 1317, 1331).*

Summary of Argument

The District Court's opinion, we submit, is replete with errors -- of both law and fact.

(1) The initial fundamental error below was the finding that any information omitted from the proxy statement was material. As to some of the information in question, the record shows that it did not even exist at the time of the merger; the District Court simply misread the record. More important, the District Court, in reaching its decision, applied an improper definition of "materiality" -- one already rejected by this Court.

The question the District Court should have determined was whether a reasonable Atron stockholder would have attached importance to the omitted data in determining how to vote on the merger. By this well-established standard, the omitted information was manifestly immaterial. In view of the, at most, marginal

* Plaintiff ITNR has cross-appealed from that part of the District Court's judgment which denied it relief.

relevance of the omitted information and the grim prospects confronting Atron in the absence of the Mohawk merger, disclosure of the omitted information would not have caused any reasonable Atron stockholder to oppose the merger. Indeed, it would not even have given him or her pause. Properly perceived, the omissions were immaterial. (See Point II, infra)

(2) The second area of error below is found in the District Court's refusal to consider the evidence adduced by defendants showing that, however an ordinary investor might have responded to the omitted information, the six experienced and sophisticated investors who commenced this action would have been wholly indifferent to such data. The court below appears to have held that, in a Section 14(a) omission case, reliance is either no longer an element or is irrebutably presumed from mere proof of materiality. The District Court thus seemingly felt required to disregard defendants' arguments and evidence that plaintiffs, had they known the omitted information, would have acted no differently in regard to the merger. What plaintiffs cared about was getting out of their restricted, failing investment in Atron, and not at all about when Mohawk might begin its new fiscal year, etc. (See Point III, infra)

(3) However, we believe this Court may not need to address the foregoing issues; the problems of "materiality" and "reliance" are merely academic questions, of course, unless plaintiffs also proved that they suffered actual damages as the result of something that defendants did or did not do.

The District Court more or less acknowledged that there was no such proof, but nevertheless went on to calculate and award damages to plaintiffs. By means of a _sua sponte_ invocation of an inapplicable doctrine of equitable estoppel and a misreading of tables showing Mohawk stock prices, the District Court decided that plaintiffs gave up appraisal rights to the fair cash value of their Atron stock worth $8.60 per share and received in exchange Mohawk stock worth $5.38, thus damaging plaintiffs by $3.22 per Atron share. But, these damage figures are distorted in that the District Court overestimated the value of an Atron share and understated the value of the Mohawk stock. Defendants argue (in Point I _infra_) that the record clearly shows that the "fair cash value" of an Atron share, on the day of the merger, if properly appraised, was no more than $3-4, while the actual value of the Mohawk stock given to plaintiffs in exchange was no less than $7. Therefore, plaintiffs were _not_ injured.

POINT I

PLAINTIFFS HAVE NOT PROVED THEY SUFFERED ANY DAMAGES AS A RESULT OF ANYTHING THAT DEFENDANTS DID OR DID NOT DO AND, IN ANY EVENT, THE DISTRICT COURT APPLIED ERRONEOUS STANDARDS IN MEASURING DAMAGES.

The key to this case is the question of damages. Whether or not the proxy statement contained material misrepresentations or omissions, the determinative fact is that plaintiffs failed to prove that they suffered any resulting damage. Plaintiffs have therefore failed to prove a necessary element of their claim.

Furthermore, even if liability were assumed, the District Court's calculation of damages is a mixture of theoretical and computational error. As its most fundamental error, the District Court mistakenly determined the fair cash value of Atron stock on April 30, 1971 solely on the basis of the market value of Mohawk stock on March 12, 1971.

A. The Applicable Theory Of Damages

Defendants are in complete agreement with the District Court's general statement of the formula to be applied in calculating damages. The opinion below succinctly states the gist of that formula (A.957; 387 F. Supp. at 1329):

> "The measure of damages is compensatory. Plaintiffs are entitled to be placed in the same position they would have enjoyed had they received the omitted information in the proxy statement, and had they voted against the merger, and pursued their dissenting shareholders' rights of appraisal."

In substance, the District Court undertook to apply a reasonable variant of the customary "out-of-pocket" measure of damages, according to which,

> ". . . the measure of damages recoverable by one who through fraud or misrepresentation has been induced to purchase bonds or corporate stock, is the difference between the contract price, or the price paid, and the real or actual value at the date of the sale . . . [o]r in other words, the difference between the amount parted with and the value of the thing received." Estate Counseling Serv. Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 303 F.2d 527, 533 (10th Cir. 1962).

The difficulty is that, having laid out the ground rules, the District Court ignored its own formulation in every important detail.

The District Court correctly held that, by going along with the merger, these plaintiffs gave up their right of appraisal as dissenting shareholders, pursuant to Minnesota law, to the "fair cash value" of their Atron stock as of April 30, 1971.* The court below also correctly observed that, under well-established principles, fair cash value should be determined by considering and giving appropriate weight to three factors: (1) the net asset value, (2) the investment (or earnings) value and (3) the market value of the Atron stock.

But the court below completely disregarded its own formula. Without justification, it held that defendants were "estopped" from denying that the fair cash value of an Atron share on April 30, 1971 was equal to one-fourth of the market value of a Mohawk share -- or $8.60 -- on March 12, 1971, the date of the formal merger agreement which was agreed to in principle on January 29, 1971. In so doing, the District Court

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* See 20 Minn. Stat. Ann. §§301.40(2), 301.44. Atron was incorporated in Minnesota (A.49; Pre-Trial Order p. 1).

erred both in law and in fact. As a matter of law, the doctrine of estoppel is inapplicable here, and may not be substituted for the tripartite process of measuring fair cash value under applicable State law. As a matter of fact, if the Atron stock had been properly appraised as of April 30, 1971, as Minnesota law and the District Court's formula alike require, the fair cash value of that stock would have been found to be less than $5 per share.

Further, even if an estoppel were proper here, the court below erred in its application of the doctrine. The court's reliance solely upon Mohawk's market price on March 12, 1971 was a two-fold error: first, the court should not have focused upon any one date, but should have considered Mohawk's market price over some reasonable period of time; and, second, March 12, 1971 was, in any event, an erroneous and irrelevant date.

The court below compounded these errors by finding that, for each share of Atron stock exchanged on April 30 at an "estoppel" value of $8.60, the plaintiffs received Mohawk stock (1/4 share) worth $5.38, and were thus damaged by $3.22 per Atron share.* The District Court erroneously held that the value of Mohawk stock on April 30 should be measured not by its market value on that date, but by its <u>lowest</u> market price in the 30-day period after plaintiffs' Mohawk stock became registered on August 25, 1971. In addition, the court incorrectly stated that such low price was $21.50.** In contrast, <u>plaintiffs</u>

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* On the merger, plaintiffs received one restricted share of Mohawk stock for every four restricted shares of Atron stock which they held on April 30, 1971.

** The actual lowest price of Mohawk stock in the period was $22; see discussion at pp. 34-35, <u>infra</u>.

themselves acknowledged that the true value of their Mohawk stock on April 30, 1971 was no less than $28.25 (A. 992; Pl. Post-Trial Mem. p. 20).

Not only was the District Court wrong in its methodology, but the record amply shows that, properly appraised, the true cash value of an Atron share as of April 30 was not $8.60, but at least under $5 and, more likely, in the range of $3 to $4. The record also shows that the true value of a Mohawk share as of April 30, even in the hands of these plaintiffs, was not $21.50 (or $5.38 per Atron share) but at least $28 (or $7 per Atron share) and, in all probability, considerably more. In other words, the record establishes that plaintiffs and the other Atron stockholders received $7 worth of Mohawk stock for each Atron share worth $3-4. Thus, plaintiffs did not suffer any damages.

B. Plaintiffs Failed To Prove They Were Damaged

The District Court introduced its calculation of damages with the following observation:

> "Neither side of this litigation has presented persuasive evidence of the true value of Atron common stock as of April 30, 1971, contrasted with market price." (A 956; 387 F. Supp. at 1329)

It also correctly rejected any notion that the fair cash value of an Atron share on April 30 could be measured by its over-the-counter market price on that date, stating that

> ". . . the April 30th price of Atron appears solely to have resulted from arbitrage." (A.957; 387 F.Supp. at 1329.)

Indeed, from the time the merger plan was first announced on January 29, 1971, the market in Atron stock began to follow

the market in Mohawk stock. The closer the merger came to reality, the greater the congruence between the two (A.469-70; Tr. 438-39). By April 30, the market in Atron was merely a quartered reflection of Mohawk's market -- an evaluation, not of Atron stock, but of the likelihood that the proposed merger, with its 4-to-1 exchange of stock ratio, would be approved. (A.970; 387 F.Supp. at 1329 n.9.)

Plaintiffs' failure to prove the true value of their Atron stock as of April 30 should have disposed of the entire litigation. This evidentiary gap should have been fatal to their case for, without proving the value of what they gave up, they could not prove they suffered any damages at all. Absent such proof of damages, judgment should have been awarded for defendants.

As this Court recently cautioned in Simon v. New Haven Board & Carton Co., ____ F.2d ____, CCH Fed. Sec. L. Rep., ¶ 95,015 at p. 97,551 (2d Cir. 1975):

> "To impose harsh penalties on one who might commit a mere technical violation of the securities laws (even if there were evidence of such a violation here, which there was not) to benefit one who has not been injured would not only be unjust, but would contravene Section 28 of the Securities Exchange Act of 1934 . . . ."

The rule of Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946), that uncertainty as to the amount of damages is to be cast on a wrongdoer, is of no help to plaintiffs here, since the Bigelow rule

> ". . . does not extend to uncertainty as to the fact of damages. 327 U.S. at 264-65. This is made clear by the Supreme Court's predicating its holding in Bigelow upon its earlier decision in Story Parchment Co. v. Paterson Parchment Paper Co., 282

U.S. 555, 562 (1931), where it observed that '[T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount." Simon v. New Haven Board & Carton Co., supra at 97,551.

C. The Fair Cash Value of Atron Stock on April 30, 1971

1. The Proper Measure Of The Fair Cash Value Of Atron Stock.

Minnesota law provides that a shareholder of a domestic corporation who objects to a pending merger may demand payment for his shares and "have the fair cash value thereof determined." 20 Minn. Stat. Ann. § 301.44(1). The Minnesota statute does not define the term "fair cash value" and the Minnesota courts have yet to interpret it. But the overwhelming majority of other courts and commentators agree that fair cash value has three principal components: (1) net asset value, (2) investment (or earnings) value and (3) market value. See e.g., Brown v. Hedahl's-Q B & R, Inc., 185 N.W.2d 249, 48 A.L.R. 3d 414 (N.D. Sup. Ct. 1971), and authorities cited therein.

The court below purported to adopt this formula (A.928-29; 387 F. Supp. at 1319-20). It did not comment on the relative weight to be attached to each of the three elements, except to note that, in New York,

> ". . . mere market value . . . is not the sole criterion in fixing value, nor is it even a major factor." (A. 928; 387 F.Supp. at 1319)

2. The District Court's Attempt To Measure The Fair Cash Value Of Atron Stock.

Despite the fact that plaintiffs failed to present "persuasive evidence of the true value of Atron common stock as

of April 30, 1971", the court below proceeded to calculate damages, based solely upon a doctrine of equitable estoppel which it invented for the purpose.

In March 1971, the boards of Mohawk and Atron formally ratified the merger agreement which had been struck on January 29, 1971. This formal agreement of merger was dated "as of" March 12, 1971. The highest market price of Mohawk on that day was $34.38, one-fourth of which is $8.60.* From this, the District Court concluded that, on March 12, Mohawk had agreed to pay $8.60 for each share of Atron and that

> "This [merger] agreement, openly arrived at, and negotiated at arms length, at least insofar as Mohawk was concerned, was effected under such circumstances as to estop Mohawk equitably from denying in this action that Atron had a value of at least $8.60." (A.957; 387 F. Supp. at 1329)

This doctrinal sleight-of-hand ignored the considerable evidence adduced by defendants proving Atron's modest net asset value, its meager investment/earnings value and the low independent market value it would have had but for the pendency of the Mohawk merger. The crucial facts were set forth in the District Court's opinion, but were totally ignored in its calculation of damages. Instead, the court below, in considering the damage issue, apparently threw up its hands in dismay and then, finding them conveniently placed, proceeded to pluck a figure from the air.

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* Generally on the rise since January 29, the average bid price for Atron stock on March 12 was approximately $7.60, already reflecting the arbitrage effect and the market's perception that Atron was getting the better of the bargain. (A.839; Def. Ex. Z.)

3. <u>Defendants Should Not Have Been Estopped From Showing That Atron Stock Was Not Worth $8.60 Per Share On April 30, 1971.</u>

The District Court cited no authority for the proposition that defendants should be estopped from denying that the fair cash value of Atron on April 30 was the same as the market value of the securities Mohawk offered to exchange for Atron stock as of March 12. Nor did the court anywhere indicate what were the special "circumstances" to which it alluded as creating such an estoppel. This unsupported and unexplained estoppel as of March 12 is the sole predicate for the District Court's finding that the value of Atron stock on April 30 was $8.60 per share. But this doctrine of estoppel can sustain neither scrutiny nor an $8.60 valuation level.

(a) <u>Estoppel Is An Inapplicable Doctrine</u>

This doctrine of estoppel was not advanced by plaintiffs, was not raised in the pre-trial or post-trial memoranda, and was never hinted at below prior to its appearance in the District Court's opinion. Thus, defendants had no opportunity to point out the multitude of errors and improprieties involved in applying the doctrine in this case.

It is clearly contrary to the relevant rules and case law to estop the defendants without having given them notice of the impending estoppel so that they might attempt to rebut it. See Fed. R. Civ. P. 8(c); <u>United States</u> v. <u>United Airlines, Inc.</u>, 216 F. Supp. 709, 718 (E.D. Wash. 1962), <u>modified on other grounds</u> <u>sub nom.</u>, <u>United Airlines, Inc.</u> v. <u>Wiener</u>, 335 F.2d 379 (9th Cir.) <u>cert. dismissed</u>, 379 U.S. 951 (1964). Further, the burden of proving any estoppel here would have been

upon plaintiffs. These plaintiffs not only did not prove it -- they did not even claim it. See Girard v. Gill, 261 F.2d 695, 697 (4th Cir. 1958) (equitable estoppel must be set forth affirmatively); also, Crosley Corp. v. United States, 229 F.2d 376, 381 (6th Cir. 1956); Helvering v. Brooklyn City Ry., 72 F.2d 274, 275 (2d Cir. 1934).

Moreover, there are no circumstances here which justify an estoppel. The doctrine of equitable estoppel prevents one party from denying the accuracy of material representations on which the other party has in good faith and rightfully relied. See 1 Williston, Contracts, § 139 (3d ed. 1954); Restatement (Second) of Contracts, § 90 (Tent. Draft No. 2, 1965). But Mohawk at no time represented to the Atron stockholders (or anyone else) that Atron had a fair cash value of $8.60 per share. Mohawk only agreed to an exchange of one share of Atron stock for one-quarter of a share of Mohawk stock which at one moment in time had a market price of $8.60, but which, at other more relevant dates, had a much lower market price. (See pp. 23-24, 33-39, infra.)

Further, the parties to the merger agreement knew, to a moral certainty, that between the "as of" date of the merger agreement (March 12) and its consummation on April 30, the market price of Mohawk stock would fluctuate -- perhaps up and perhaps down. No one could reasonably represent or confidently presume on March 12 that the Atron stockholders would receive for each Atron share a minimum of $8.60 in market value of Mohawk shares on April 30.

(b) The Effect Of The Estoppel, If Applicable, Was Improperly Calculated.

Even if an equitable estoppel were justified on the facts of this case -- which it plainly was not -- the District Court's erroneous application of the doctrine would still require reversal of the judgment below.

(i) March 12 Is An Irrelevant Date

To begin with, the March 12, 1971 valuation date employed by the court below was meaningless. The Mohawk directors did not approve the merger agreement on March 12; they did so at a board meeting on March 2 (A.539-43; P. Ex. 16). (The formal merger agreement was merely dated "as of" March 12 as a matter of drafting.) On March 2, 1971, Mohawk stock closed at $31, one-fourth of which is $7.75, not $8.60.

Moreover, the action taken by the Mohawk Board on March 2 merely ratified an agreement which had been struck in principle five weeks earlier, on January 29, 1971, when the principal officers of Atron and Mohawk shook hands on the merger (A. 60; Pre-Trial Order p. 12). On January 29, Mohawk closed at $29 (or $7.25 per Atron share). It was on January 29 that the 4-to-1 exchange ratio was fixed (Id.; A. 207-08; Tr. 140-41). Nothing in the minutes of the March 2 Mohawk Board meeting suggests that its ratification of the January 29 terms involved any reconsideration of the exchange ratio or of the worth of Atron to Mohawk. (A.537-48; P. Ex. 16.)

Accordingly, if it were proper at all to determine the value of Mohawk stock on the basis of its market price on a particular date, the most appropriate date would be

January 29, 1971, not the March 12, 1971 date adopted by the court below. But, the District Court's reference to market value on a single day to evaluate Mohawk's worth was itself improper, and ignored the realities of the market context in which this merger took place.

(ii) Mohawk Stock Should Not Have Been Valued By Reference To Its Market Price On Any Single Day.

It is well recognized by the financial community and by the courts that, for valuation purposes, the "market value" of a stock is not its price at a particular moment or even on a particular date but, rather, the average of its prices over some reasonable period of time. See, *e.g.*, 15 Fletcher, *Cyclopedia of Corporations*, § 7165.4, p.295 (1973 rev. ed.); *Note*, 79 Harv. L. Rev. 1453, 1461 (1966). This is particularly true where, as here, the market for the stock to be valued was volatile and, thus, its market price at any one point fortuitous (A.460-62; Tr. 429-31).

If the District Court had looked, as it should, at Mohawk stock at more than a mere moment in time, it would have seen a very different value. Thus, Mohawk's average closing price in the period from January 1 through January 29, 1971 was \$25.95 (or \$6.49 per Atron share) and the average closing price for the 30 days ending March 2, 1971 was \$30.34 (or \$7.59 per Atron share). These figures are well below the \$34.38 figure which the District Court held defendants were estopped from denying.

(iii) Mohawk Made No Cash Offer.

The estoppel approach also assumes that Mohawk

offered to pay $8.60 for each share of Atron stock, but there is not a scintilla of evidence in the record -- and no reason to believe -- that Mohawk was ever willing (or realistically able) to pay $8.60 in cash for the Atron securities. It is critical to note that what Mohawk offered to exchange for Atron stock was not cash, but Mohawk stock. In commercial life, paper flows far more freely than money.

It is axiomatic in acquisition transactions that a company, like Mohawk, whose stock is selling well above book value and at a high multiple of earnings, will offer a prospective merger partner more in stock than in cash. Here, there is no evidence that Mohawk was prepared to offer the Atron stockholders a cash deal at all, much less one for anything like $8.60 per Atron share.* (See A.208; Tr. 141.) The District Court ignored these key considerations.

Moreover, had the Minnesota legislature intended the fair cash value of a dissenter's shares as of a merger date to be measured by the market value of the shares offered in exchange on the date of the merger agreement, it could readily have written its statute so to provide. Likewise, had the legislature intended such market value on the date of the agreement to serve as a floor in measuring the fair cash value on the date of the merger, it could have done so. See, e.g., Dickinson v. Fire Ass'n, 378 Pa. 396, 106 A.2d 607 (1954). But, it did nothing of the kind (and would have been unrealistic to do so). Instead, the Minnesota statute provides that dissenters

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* Quite the contrary, Mohawk expressly reserved the right to terminate the merger agreement if holders of more than 10% of Atron stock demanded payment in cash pursuant to the Minnesota appraisal statute (A.554; Pl. Ex. 18 p. 5).

should have the "fair cash value" of their stock -- which means that net asset value and investment (or earnings) value must be weighed in addition to market value. See Annot., 48 A.L.R.3d 430, 442-51 (1973). Estoppel has no place in this process.

4. Actual Fair Cash Value Of Atron Stock

Notwithstanding the District Court's complaint as to the absence of evidence of the true value of Atron stock on April 30, 1971, the fact is (and the record shows) that there was substantial evidence, direct and indirect, concerning Atron's net asset value, its investment or earnings value and what its independent market value would have been on that date. All of this evidence proves that plaintiffs were not in fact injured -- since, by any measurement, the fair cash value of the Atron stock they gave up was less than the value of the Mohawk stock they received.

(a) Actual Net Asset Value Of Atron

Clearly there was ample evidence of the net asset value of Atron.

The Atron proxy statement in issue (A.583; Pl. Ex. 18 p. 34) contained Atron's September 30, 1970 balance sheet showing total assets of $4,601,311. This included $3,109,290 in cash or its equivalent, and $333,411 in accounts receivable. Atron's total current assets were listed as $3,952,062, and its total current liabilities as $304,371. As the proxy statement recites, the per share book value of Atron on September 30, 1970 was $3.95 (A.557; Id. at 8). Since the great preponderance of Atron's assets consisted of cash, cash equivalents and accounts receivable, there is no reason to suppose any significant

variation between its book value and net asset value. Therefore, on September 30, 1970, Atron's per share net asset value was no more than about $3.95.

And, Atron's net asset value could only have declined in the seven months between September 30, 1970 and the date of the merger, April 30, 1971. In the last quarter of 1970, Atron suffered a net loss of $.13 per share. Further, Atron's September 30, 1970 balance sheet showed as an asset the amount of $323,219 as "unrecovered promotional and developmental costs, net of amortization"; this bookkeeping asset would be of slight significance in any fair calculation of net asset value of the company.* If disregarded, it would reduce the per share value by almost another $.29.

Moreover, as of January 29, 1971, the date the merger was agreed to in principle, Atron had been incurring monthly operating losses of about $200,000 (A.442; Tr. 410). The District Court found that these operating losses were "continuing during the months immediately prior to April 30, 1971" (A.914-15; 387 F.Supp. at 1315). Each month of such losses would reduce per share net asset value by about another $.20.

Adding up all these minuses, the record establishes that the per share net asset value of Atron on April 30, 1971 was in the neighborhood of $3. Certainly, it could have been no more than the $3.95 reported as of September 30, 1970. And, beyond question, it was substantially less than the $5.38

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* Atron's accountants were compelled to qualify their opinion certifying Atron's financial statements in this respect, noting that "[r]ecovery of these costs is dependent upon the future success of operations." (A.582; Id. at 33).

per share value which the court below ascribed to the Mohawk stock for which the Atron stock was exchanged. (See p. 16, supra.)

(b) Actual Investment (Or Earnings) Value Of Atron

The record evidence reflecting Atron's investment value, while less direct, was equally substantial. Atron was simply not a very attractive company to any investor other than Mohawk (A.312).

"Investment value" takes account of earnings (or losses), capitalization, history, dividend record, position in the industry, the prospects of the business and of the industry, and the overall value of the company's securities in relation to general market conditions and the market value of comparable securities. See, e.g., Matter of Fulton, 257 N.Y. 487, 178 N.E. 766 (1931); Matter of Behrens, 61 N.Y.S.2d 179 (Sup. Ct. N.Y. Co. 1946), aff'd sub nom., Matter of Standard Coated Prods. Corp., 271 App. Div. 1007, 69 N.Y.S.2d 910 (1st Dep't 1947); 15 Fletcher, Cyclopedia of Corporations, § 7165.4, p. 295 (1973 rev. ed.), supra.* In effect, investment value is an attempt to predict future income on the basis of a company's past earnings record. Note, 79 Harv. L. Rev. 1453, 1464 (1966), supra.*

Here, of course, as the court below apparently recognized, such a prediction could only be based upon Atron's prospects "without regard to any benefits flowing from the Mohawk merger" and on "'a going concern basis.'" A.957, 929; 387 F.Supp. at 1329, 1320; see Note, 79 Harv. L. Rev., supra at 1456-57; Root v. York Corp., 29 Del. Ch. 351, 50 A.2d 52, 56 (1946).

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* Fletcher's treatise and the Harvard Law Review article were among the authorities cited by the court below in discussing "fair cash value" (A.928-29; 387 F.Supp. at 1319-20).

In its first and only full year of operation, Atron had a gross operating income of about $900,000 at a cost of about $2,200,000, thus sustaining a net operating loss of about $1,300,000 (A. 561; Pl. Ex. 18 p. 12). Atron was a losing operation throughout the 16 months of its independent operating existence. (Id.). It never paid a dividend. It was continuing to lose money at the rate of approximately $200,000 a month. (A.442) It had been selling 90% of its output to a single customer -- Mohawk -- and was about to lose that customer. As a source of earnings, Atron's prospects as an investment were bleak, to say the least. (A.426)

To be sure, Atron was not absolutely worthless. Either in liquidation or in merger, Atron would have had some value, but in neither event could that value have been much greater than its net asset value (i.e., $3 to $3.95 per share, see pp. 26-27, supra). Moreover, Atron's investment value, either in liquidation or in some hypothetical alternative merger,* would have to be discounted by virtue of the substantial and certain expenses and further operating losses which would have been encountered in the process of liquidation or while searching for and effecting the hypothetical alternate merger.

The only evidence that Atron had an investment value greater than its net asset value is the fact that Mohawk's exchange offer was more generous than net asset value. But, the fact that Mohawk offered to exchange Mohawk paper variously

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* There is nothing in the record to indicate that any company other than Mohawk offered a merger to Atron. See A. 311-12).

worth \$8.60, or \$7.75, or \$7.59, or \$7.25, or \$6.49 per Atron share (see pp. 23-24, supra) is evidence only of what Mohawk thought Atron was worth to Mohawk; it does not prove the investment value of Atron to the market. A.426-27; Tr. 394-95; see Adams v. R. C. Williams & Co., 39 Del. Ch. 61, 158 A.2d 797, 799 (1960) (court took judicial notice of "the fact that a corporation sometimes pays a premium to obtain a business which it feels will fit in with its needs"). Under Minnesota law, plaintiffs are not entitled to their share of Atron's investment value to Mohawk, but only to their share of Atron's actual fair cash value.

Moreover, it is quite clear that Atron was worth more to Mohawk than to the market in general or to anyone else. Mohawk and Atron were remarkably well-matched merger partners (A.315). Mohawk was Atron's largest customer (A.561; Pl. Ex. 18 p. 12). Mohawk had the right to manufacture Atron's product, but Atron had the experience of actually producing it (A.207). Similarly, Mohawk had a unique desire to retain as a unit the collection of scientists whom Atron had assembled (A.426). Given such operational compatibility, it is not at all surprising that Mohawk would make a generous offer. Further, Mohawk held almost 20% of Atron's stock (A.552; Pl. Ex. 18 p. 3). It had a substantial investment which was in jeopardy and which it wished to protect, if possible (A.441-42). Mohawk's evaluation of Atron thus does not define Atron's inherent investment value, which is what the court below was required (but failed) to determine.

In sum, Atron's investment value as of April 30, 1971 could not have been much greater than its net asset value, and certainly could not have been close to the $5.38 value which the court below found each Atron shareholder received as a result of the merger with Mohawk. Any value of Atron stock below $5.38 results in an absence of damages to plaintiffs.

(c) Actual Market Value of Atron

After January 29, 1971, when the merger plans were announced, the market, as the District Court recognized (A.956-57; 387 F.Supp. at 1329), could not place a value on Atron stock independent of the merger. Not even in January 1971, when independent valuation was possible, did Atron stock sell for the $8.60 figure the District Court devised.

On January 29, 1971, the day the agreement to merge was announced, the average bid price for an Atron share was $7.83. On the previous day, January 28, 1971, the average bid price was $7.75. Earlier in January, the average bid price for the stock was as low as $5.50. (A.556; Pl. Ex. 18 p. 7).

After January 29, 1971, the market in Atron was ever increasingly controlled by the effect of arbitrage in view of the upcoming merger (A.970; 387 F.Supp. at 1329 n.9). There can be no doubt that, had there been a truly independent market in Atron stock between January 29 and April 30, 1971, the price of Atron would have declined from its January levels. The market would presumably have reflected Atron's continuing heavy operating losses at an annual rate in excess of $2,000,000. More important, the market would reflect the fact that Atron was about to lose Mohawk as its customer and, with it, some 90%

of its sales (A.426). The record is devoid of any happy prospects for Atron (other than the merger proposal itself) which might have counterbalanced the negative effect of this dark data.

Moreover, evidence of Atron's market price prior to the January 29 announcement must be viewed with some suspicion in light of the relative thinness of the Atron market. Less than 30% of Atron's 1,093,323 shares outstanding were freely tradeable (A.54-57; Pre-Trial Order pp. 6-9). In addition, as is especially true in the case of a thinly traded stock, a market valuation should be made over some reasonable period of time, instead of at a single point in time. See 79 Harv. L. Rev. 1453, 1460-61 (1966), supra. However, the only evidence introduced concerning the independent Atron market was for a three-week period beginning January 4, 1971 (A.791; Def. Ex. Z).*

Finally, there can be no doubt that the market -- unlike the District Court (A.928; 387 F.Supp. at 1319) -- would have further discounted the value of the particular Atron stock these plaintiffs owned because their stock was restricted and could not have been freely sold in the absence of a registration statement under the Securities Act of 1933 (A.54; Pre-Trial Order p. 6). Here, again, the District Court ignored a critical fact affecting the "fair cash value" of plaintiffs' Atron stock.

In sum, the record establishes that Atron never had an independent market value as high as the $8.60 figure which the Court below assumed. In any case, as demonstrated above, any realistic appraisal of plaintiffs' Atron stock shows that its

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* The evidence shows that Atron's average bid price from January 4 through January 29, 1971 was approximately $6.88, not $8.60.

fair cash value was far less than the value of the Mohawk stock for which it was exchanged, whether one regards that exchange as having occurred on January 29, March 2, March 12, April 30, August 25, September 25 or any point within the period. Plaintiffs were thus not injured.

D. <u>The Value Of Mohawk Stock On April 30, 1971</u>

The District Court not only mismeasured the value of the Atron stock which plaintiffs surrendered, it also substantially miscalculated the value of the Mohawk stock which plaintiffs received in exchange for their Atron stock.

Unlike Atron, Mohawk stock had an independent market value on April 30, 1971: its closing price that day was $44.63 (A.76; Pre-Trial Order, Schedule A). However, the court below completely disregarded this independently established figure. Instead, it found the value of plaintiffs' Mohawk stock on April 30 to be $21.50 -- less than half of its actual market price on the day in question.

1. <u>The District Court's Calculation</u>

The process by which the District Court reached its figure is easy to summarize, but hard to understand.

Because plaintiffs' Atron stock was restricted, the Mohawk stock they received in exchange was also restricted. By letter dated May 26, 1971, plaintiffs were advised that Mohawk would register their new restricted Mohawk shares if they so requested; all except plaintiff ITNR so requested (A.62-63; Pre-Trial Order pp. 14-15). The registration statement became effective on August 25, 1971, on which date Mohawk's average price was $28.38 (A. 77; *id.*, Schedule A). On this basis, the court below held that, as of August 25,

". . . plaintiffs came under an obligation to mitigate their damages arising out of their acquiescence in the merger. . . . A thirty day period following August 25th would seem to represent a reasonable time within which plaintiffs should have disposed of their Mohawk shares so as to mitigate their damages, and any plaintiff holding Mohawk shares after September 25, 1971 is considered by the Court to have made a new investment decision. . . .

The lowest price during that period for replacement was $21.50 per share." (A.960-61; 387 F. Supp. at 1330-31)

This approach was entirely the District Court's own invention. Indeed, not even plaintiffs thought they were entitled to a 30-day mitigation period, nor a valuation so low as $21.50 for their Mohawk stock; in their Post-Trial Memorandum, plaintiffs conceded that

> "The true value, on April 30, 1971 of the Mohawk stock received by plaintiffs was the amount which they were able to sell it for when the restrictions on its transfer finally were lifted, namely on August 25, 1971. On that date, the average price of Mohawk on the New York Stock Exchange was 28-1/4 per share." (A.992; Pl. Post-Trial Mem. p. 20; emphasis supplied)*

In light of plaintiffs' unambiguous position on this issue, defendants were surprised unfairly by, and were not given the opportunity to dispute, the $21.50 per share figure seized upon by the District Court.

2. The Errors In The District Court's Calculation

The District Court began with a mistake of fact: Demonstrably, the lowest price of Mohawk stock in the period August 26 through September 25, 1971 was not $21.50, as the court

* Actually, the average price on August 25, 1971 was higher, $28-3/8. See Table B3 to this brief.

below found, but $22, reached on September 23, 1971. Since the relevant data was not in the record, the source of the court's confusion is unclear; assuming the court below took judicial notice of the ISL Daily Stock Price Index, it presumably misread the tables.* This plain error alone accounts for nearly $6,000 of the damages awarded plaintiffs.**

However, as plaintiffs themselves have effectively conceded (supra), the District Court's focus upon the Mohawk market after August 25 is misplaced. Plaintiffs had known for some three months prior to the August 25 registration date that their restricted stock was going to be registered (A.62-63; Pre-Trial Order pp. 14-15). If they needed time to decide whether or not to sell their Mohawk stock once it was free, they had ample opportunity to evaluate their options in the three months prior to August 25. Since none of plaintiffs in fact sold their stock on August 25 (or for many days thereafter), plaintiffs should be deemed to have made their "new investment decision" on August 25.

In this connection, plaintiffs faced no practical problems in selling their shares on or about August 25 in view of

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* Since the record only sets forth Mohawk's market prices through September 15, 1971, we have attached to this brief as Tables B1 to B3 a reproduction of the ISL Daily Stock Price Index for Mohawk for the first three quarters of 1971.

** The District Court made a similar mistake of fact in stating that plaintiff LeLandais & Co. sold its Mohawk stock within the 30-day period for $43,250 (A.961; 387 F.Supp. at 1331). The fact is that the stock was sold for $43,520 net of commissions (A.63; Pre-Trial Order p. 15). Even assuming that defendants should be charged with such plaintiff's costs of sale, the District Court, by its own theory, overstated LeLandais & Co.'s damages by $270 -- a small mistake, but a good example of the lack of proper analysis in the opinion below.

the relatively small number of shares they owned as compared to the active and broad trading market for Mohawk shares. Specifically, during the month of August 1971, the average weekly trading volume of Mohawk stock was almost 157,000 shares, while plaintiffs together held only 13,457 shares. (See Table B3 hereto.)

But, even if it were proper to allow plaintiffs an additional 30 days after the registration date within which to (1) mitigate their damages by selling the Mohawk stock they had received or (2) make a new investment decision by retaining it, the District Court's notion that damages should be measured by the lowest price for Mohawk stock within that period -- a price at which no plaintiff in fact sold -- is as lacking in precedent as it is in logic. It might measure the maximum damage which might have occurred, but it does not measure any damage which actually occurred. Such an approach to damages is not only unfair, it is violative of Section 28(a) of the Securities Exchange Act of 1934, which permits only "actual damages," and prohibits punitive damages. 15 U.S.C. § 78bb(a); see Green v. Wolf Corp., 406 F.2d 291, 303 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969).

If plaintiffs are deemed to have made a new investment decision by failing to act within the 30-day period after August 25, 1971, one could arguably measure the value of Mohawk stock by looking to its average price on the 30th day, Saturday, September 25, the day the new investment decision was deemed to have been made. The average price of Mohawk stock on the nearest trading day, September 24, was $23.50, not $21.50. (See Table

B3 hereto.) More logically, and more fairly, one should consider the average of the prices during the 30-day period within which plaintiffs were required to mitigate or make a new investment decision.* The average of the closing prices for Mohawk stock in the 30-day period from August 26 through September 25, 1971 was $26.21 (<u>not</u> $21.50). (See Table B3 hereto.)

Further, plaintiffs had ample opportunity to recoup any supposed losses on the merger long before August 25. True, their Mohawk stock was restricted until August 25 and, therefore, could not be freely sold. But there were other means by which plaintiffs could have attempted to dispose of their newly acquired Mohawk stock. Once the announcement of the previously (and, allegedly, wrongfully) non-disclosed facts as to possible accounting changes had been made by Mohawk on May 4, 1971 -- as the District Court found (A.953-54; 387 F.Supp. at 1328) -- plaintiffs, if they were truly unhappy, could have attempted to arrange a so-called "private placement" of their shares. Admittedly, any such sale would have been made at a discount below the then market. However, the market price for Mohawk stock during the period between May 4 and June 4, 1971, for example, averaged $41.02 per share and, thus, even a 25% discount would have produced a price of $30.77 per share -- well above the $21.50 figure on which the District Court's decision is based. (See Table B3 hereto.)

Moreover, since Mohawk announced on May 26, 1971 that

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* Indeed, in Pearlstein v. Scudder & German, 346 F. Supp. 443, 455 (S.D.N.Y. 1972), which is cited in its opinion here, the court below, faced with an analogous problem, adopted the practice of assessing value by <u>averaging</u> the market over a period of time.

it was prepared to register the stock, it is quite conceivable that any such private sale would have entailed only a nominal discount, since the registration was only a few months away, in contrast to the typical private placement situation where the investor must hold the shares for at least two years. But there is no evidence that any plaintiff made any effort to pursue private placement possibilities.*

Two of plaintiffs did in fact purport to sell the Mohawk stock they expected to receive as a result of the merger. On or about May 5, 1971, plaintiff Coronet sold 5,312 Mohawk shares at a price per share of approximately $44.17, after deducting commissions (A.61; Pre-Trial Order p. 13). On or about May 12, 1971, plaintiff RSI sold 1,500 Mohawk shares at a price of approximately $42.07 per share, after deducting commissions (A.62; _id._ at 14). However, since Coronet and RSI could not then deliver unrestricted Mohawk shares to their brokers, they subsequently bought the same number of Mohawk shares to cover their sales. Coronet bought 5,312 shares on June 2, 1971 at a price of approximately $41.77 (including commissions), and RSI bought 1,500 shares on or about July 12, 1971 at a price of approximately $29.79 (including commissions) (_Id._). Coronet thus realized a profit of $12,725.33; RSI's profit was $18,424.61.

The District Court held -- incorrectly, we submit -- that these profits would _not_ be offset against Coronet's and RSI's

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* If made, the effort would have been highly profitable for plaintiffs. All of plaintiffs, except ITNR (whose claims were dismissed), purchased their Atron stock at $2 per share in January 1969. (A.55-57; Pre-Trial Order pp. 7-9.) Had they made a private placement of their Mohawk stock at $30.77, they would each have obtained a capital gain of almost 300% in a 2-1/2-year period from an investment in a failing company. This would have been no mean trick, even for sophisticated investors such as these plaintiffs.

damages (A.960; 387 F. Supp. at 1330). These profits, we submit, should be offset against any damages these two plaintiffs allegedly suffered. To hold otherwise is to give Coronet and RSI more than their "actual damages," a result prohibited by Section 28(a) of the 1934 Act. In this respect, as in others, the District Court improperly assessed the true extent of plaintiffs' damages.

Finally, there is no need to look beyond Mohawk's actual and indisputable market price on April 30, 1971 of $44.63 in order to determine the value of Mohawk's stock on that date for the purpose of computing plaintiffs' damages, if any. If the District Court were correct in refusing to discount the value of plaintiffs' Atron stock because it was restricted, the same court, in equity, ought not to have "written down" the value of plaintiffs' Mohawk stock simply because it, too, was briefly restricted. Nevertheless, when it evaluated plaintiffs' Mohawk stock, the District Court used the fact of its restriction to discount its value by more than 50%, from $44.63 (the market price of Mohawk stock on April 30, 1971) to $21.50 (the supposed lowest market price of Mohawk stock between August 26 and September 25, 1971). There is no justification for such one-sided discounting.

No matter how one undertakes to measure the value of Mohawk stock as of April 30, 1971, the result is substantially in excess of the District Court's figure of $21.50. If one undertakes to value Mohawk stock on April 30 by the obvious step of considering its actual market price on that date, the figure is $44.63. If one looks to the market on August 25, 1971, the day when plaintiffs' desire, supposedly festering since the May 4, 1971 announcement, to sell their Mohawk stock in the market became

legally possible, the average is $28.38. If one takes the average price during the entire 30-day alleged "mitigation period", the figure is $26.21. If one takes the price at the end of that period, the figure is $23.50. Finally, even if one takes the absurdly irrelevant step of looking for the lowest price of Mohawk stock during that 30-day period, as the court below purported to do, the figure is $22. (See Table B3 hereto.) In no event is the figure the $21.50 one the court below created.

E. Conclusion On Damages

In sum, the District Court unjustifiably ignored the applicable appraisal test for determining the fair cash value of an Atron share on April 30, 1971. Had the court below measured net asset value, investment value and market value as of that date, no matter how those different elements might have been weighted, it would have reached a valuation figure for the Atron stock substantially below the $8.60 price it chose to employ. The record shows that the true fair cash value of plaintiffs' Atron stock was probably no more than $3-4 per share, and was certainly less than $5.38, the figure at which the court below valued the Mohawk stock which plaintiffs received in exchange. Thus, plaintiffs were not damaged.

In any event, even if an Atron share was worth something more than $5.38 on April 30, 1971, plaintiffs still were not damaged, since the Mohawk stock they obtained in exchange was itself worth substantially more on and after April 30, 1971 than the Atron stock -- even to these plaintiffs.

POINT II

THE INFORMATION OMITTED FROM THE PROXY STATEMENT WAS NOT MATERIAL AND, IN ANY EVENT, THE DISTRICT COURT APPLIED AN ERRONEOUS STANDARD IN DETERMINING MATERIALITY

In finding liability, the District Court held that defendants omitted three (or possibly four) categories of "material" information from the Atron proxy statement, in violation of Section 14(a) of the 1934 Act.*

Some of this "information," however, did not exist at the time of the April 30, 1971 merger and so could not properly have been included in the proxy statement; to this extent, the District Court's findings are clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure. More important, the District Court's conclusion that the omissions were material was based upon an erroneous definition of "materiality." Application of the correct test of materiality to the record facts, we submit, requires a judgment for defendants.

A. The Correct Standard Of "Materiality" In § 14(a) Cases

The meaning of materiality in securities "fraud" cases in this Circuit was clearly articulated in List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir.), cert. denied, 382 U.S. 811 (1965), a Rule 10b-5 case. The test is whether

* Plaintiffs' complaint also alleged that the omissions violated Section 10(b) of the 1934 Act. The District Court treated plaintiffs' claim simply as a 14(a) matter; there was no finding of scienter or recklessness, which would have been a necessary prerequisite to any finding of liability under § 10(b) or Rule 10b-5. See Lanza v. Drexel & Co., 479 F.2d 1277, 1306 (2d Cir. 1973), and Republic Technology Fund, Inc. v. Lionel Corp., 483 F.2d 540, 551 (2d Cir. 1973), cert. denied, 415 U.S. 918 (1974), and cases cited therein. Defendants therefore proceed on the assumption that they are appealing from a finding of liability only on plaintiffs' § 14(a) claim.

"'a reasonable man would attach importance (to the fact misrepresented) in determining his choice of action in the transaction in question.'" (Emphasis supplied)

Thereafter, in General Time Corp. v. Talley Indus., Inc., 403 F.2d 159, 162 (2d Cir. 1968), cert. denied, 393 U.S. 1026 (1969), a Section 14(a) case, this Court restated the test without changing its substance:

"[T]aking a properly realistic view, there [must be] a substantial likelihood that the misstatement or omission may have led a stockholder to grant a proxy to the solicitor or to withhold one from the other side, whereas in the absence of this he would have taken a contrary course." (Emphasis supplied)

And, in Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973), this Court reconsidered the standard in light of Mills v. Electric Auto-Lite Co., 396 U.S. 375, 384 (1970), and Affiliated Ute Citizens v. United States, 406 U.S 128, 153-54 (1972). The outcome was a forceful reaffirmation of the formulation set forth in List and General Time, at least in connection with Section 14(a) complaints.

Central to this Court's holding in Gerstle is the fact that, while scienter is a vital element of proof in Section 10(b) actions, it is normally not required in Section 14(a) cases. As Judge Friendly explained:

"[T]he very fact that negligence suffices to invoke liability [in Section 14(a) cases] argues for a realistic standard of materiality. . . . When account is taken of the heavy damages that may be imposed, a standard tending toward probability rather than toward mere possibility is more appropriate. 478 F.2d at 1302 (emphasis supplied).

This Court went on to observe in Gerstle that the Supreme Court in Mills had said that, in order to be material under Rule 14a-9,

"the defect must 'have a significant propensity to affect the voting process'. . . ." (478 F.2d at 1302, citing 396 U.S. at 384; emphasis in original).

The strict, but fair, "would" standard of List-Gerstle has been consistently applied by the courts of this Circuit. See, e.g., Republic Technology Fund, Inc. v. Lionel Corporation, 483 F.2d 540, 551 (2d Cir. 1973), cert. denied, 415 U.S. 918 (1974); Bragalini v. Biblowitz, _____ F. Supp. _____, CCH Fed. Sec. L. Rep., ¶ 94,371 (S.D.N.Y. 1974); Jackson v. Oppenheim, _____ F. Supp. _____, CCH Fed. Sec. L. Rep., ¶ 94,894 (S.D.N.Y. 1974).

The District Court here simply ignored this carefully constructed standard. Instead, it stated:

> "In a nondisclosure case under Rule 14b-9[sic] as well as Rule 10b-5 plaintiff must show 'that the facts in question were material "in the sense that a reasonable investor might have considered them important" in making his investment decisions.' Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974). See also, Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 374 (2d Cir. 1973)." (A.955; 387 F. Supp. at 1329; emphasis supplied)

The District Court's reliance upon Schlick and Chris-Craft was misplaced. The quoted portion of the Schlick opinion relates to a Section 10(b) claim (507 F.2d at 381) and, thus, is inapplicable to this Section 14(a) case. This Court's holding in Gerstle is expressly based upon the distinction between Sections 10(b) and 14(a) actions and the necessity for a more stringent standard of materiality in the latter cases.

The Chris-Craft opinion also flatly contradicts the proposition for which it was cited by the court below. Chris-Craft

does not apply a "might" test, but rather reaffirms the "would" standard of List and Gerstle, supra:

> "The concept of materiality focuses on weightiness of the misstated or omitted fact in a reasonable investor's decision to buy or sell. We articulated the materiality standard in List [citation omitted] to be 'whether "a reasonable man would attach importance (to the fact misrepresented) in determining his choice of action in the transaction question."' The materiality test is concerned only with whether a prototype reasonable investor would have relied. [Citation omitted.] Account must be taken of all the surrounding circumstances to determine whether the fact under consideration is of such significance that a reasonable investor would weigh it in his decision whether or not to invest." (480 F.2d at 362; emphasis supplied)

Clearly, in settling for mere "possibility," instead of "probability," the District Court was in error. The question remains whether this error made any practical difference here. We submit it did. As Judge Friendly observed in Gerstle, the difference between "might" and "would" is not mere "gossamer" (478 F.2d at 1302). In this case, the difference between "might" and "would" is the difference between a judgment against, and a judgment for, defendants.

B. The Data Not Disclosed In The Proxy Statement

The three or four categories of undisclosed data involved in this action concerned no high-level secrets. There were no undisclosed disasters, defalcations or dramatic discoveries.

Rather, defendants have been found liable because of a failure to disclose that Mohawk was (1) changing its accounting year, (2) changing its system of financing a small fraction of its equipment, and (3) changing from one to another generally accepted method of accounting for its sales to unaffiliated third

parties of a portion of equipment placed on long-term leases.

1. The Change of The Fiscal Year

Prior to 1971, Mohawk's fiscal year had ended on July 31. Because much of its business was based in Europe, this date had proved awkward (A.147, 435). The year 1971 proved to be an appropriate time to make the long-anticipated change in the fiscal year: April 30, 1971 marked the acquisition of Atron, the introduction of a major new line of products by Mohawk and, hopefully, the end of a business downturn which had generally affected Mohawk and the rest of the peripheral computer industry (A.460-62). Therefore, in March 1971, it was decided that fiscal 1971 would be a short year ending on April 30. This decision was not disclosed in the proxy statement.*

The District Court found this omission to have been material. However, the court cited no other instance in which a defendant has been held liable under the 1934 Act (or any other statute) for failing to disclose an intention to change a company's fiscal year. We suggest that the court below was wrong under any standard of materiality. It simply could not have been relevant to any Atron stockholder whether April 30, 1971 was the end of Mohawk's third quarter or the end of its short fiscal year.

2. The Cessation Of Sales Of Leased Equipment to Unaffiliated Third Parties

Mohawk was in the business of manufacturing computer equipment; its machines were either sold or leased. Beginning in

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* The proxy statement was dated and mailed on April 16, 1971 (A.550, 60; Pl. Exh. 18 p. 1; Pre-Trial Order p. 12).

1970, Mohawk adopted the practice of selling some of the machines which it had placed on long-term leases to unaffiliated third parties. Mohawk received the purchase price; the buyer received the rental income under the lease, with certain guarantees. Such third party sales constituted a method of financing the costs of the equipment.

In early 1971, Mohawk's principal officers decided to stop making such sales. This business decision was not among the facts set forth in the proxy statement. The District Court held that this decision represented

> ". . . a substantial change in the nature of Mohawk's business and should have been disclosed in the proxy statement." (A.953; 387 F. Supp. at 1328)

But, on the contrary, this change was neither "substantial" nor a change in the "nature of Mohawk's business."

Mohawk's business was making computer equipment for sale or lease. Whether or not it subsequently sold to unaffiliated third parties some of the machines which it was renting out had no effect upon the total number of machines manufactured by Mohawk and subsequently sold or leased. What Mohawk changed was a financing device, not the nature of its business.

Further, the District Court overstated the significance of these sales. Thus, in fiscal 1970, Mohawk had net sales of $64,351,000 and rental and service income of $38,199,000, for total revenues of $102,550,000. Its gross profit that year was $48,647,000 (A.562; Pl. Ex. 18 p. 13). Sales of leased equipment to unaffiliated third parties amounted to $4,100,000 in

fiscal 1970, about 40% of which was gross profit (A.183). Thus, in fiscal 1970, these third party sales represented less than 4% of Mohawk's gross revenues and 3% of its gross profit. And even these figures are exaggerated since, if Mohawk had made no such third party sales, it would instead have had increased rental income by reason of its receipt of the rental on the unsold leases.

Moreover, there was no attempt by Mohawk to hide the decision to stop such sales. On the contrary, the development was reported to a Reuters representative, who included the information in a dispatch carried over the Reuters tape on April 9, 1971, three weeks before the merger (A.981-82; Def. Ex. T). It was not detailed in the proxy statement precisely because it was the kind of normal day-to-day business decision, of no particular external significance, with which proxy statements need not, and should not, be cluttered. As was recently aptly stated:

> "But for the materiality requirement, stockholders might be so overwhelmed with information that their ability to make an informed decision, based on a consideration of relevant, significant information, would be diminished." Bragalini v. Biblowitz, ____ F. Supp. ____ CCH Fed. Sec. L. Rep., ¶ 94,371, at 95,266 (S.D.N.Y. 1974), supra.

3. The Change From The Financing Method To The Operating Method Of Accounting For Sales Of Leased Equipment To Unaffiliated Third Parties

At all relevant times, Mohawk had a choice of two permissible ways to account for the proceeds of the above-described third party sales: the so-called "financing" method and "opera-

method described in the District Court's opinion.*

When Mohawk commenced such sales in 1970, it opted for the financing method, the effect of which was that all anticipated net income relating to such machines was booked at the time of the sale transaction. Under the operating method, the income attributable to a machine would be booked over the life of the lease notwithstanding the technical sale; in effect, the sale income was treated much as if it were simply rental income. The effect of the financing method is to accelerate the realization of income on paper; the effect of the operating method is to spread that same income out over several years (A.945-49; 387 F. Supp. at 1325-26).

There is no question that in March and April of 1971, Richard P. Rifenburgh, president of Mohawk, and Wayne Wells, Mohawk's executive vice president and treasurer, several times discussed the possibility of Mohawk switching from the financing to the operating method of accounting for these sales, and that Wells several times discussed this same point with Mohawk's auditors, S.D. Leidesdorf & Co. Eventually, the switch was made, effective as of the close of fiscal year 1971, ending April 30, 1971. In consequence, Mohawk's fiscal 1970 income statement was recalculated, using the operating method, to permit comparison with Mohawk's fiscal 1971 income report. (A.492-93; Tr. 467-68.)

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* The Court expressly found that "[b]oth accounting methods were in accordance with accepted principles of accounting in 1970 and 1971" (A.947; 387 F. Supp. at 1325) and that "[m]any prestigious corporations engaged in the leasing of equipment and represented in their fiscal affairs by skilled accountants of the highest level of learning and ability, were booking their revenues in accordance with the financing method." (A.947; 387 F. Supp. at 1325-26.)

At trial, defendants contended (1) that Rifenburgh did not decide to favor this change until some time in May, well after the merger date, and only after testing the idea as a trial balloon at a security analysts meeting held on May 4, and (2) that the change was not finally made until approved by the Mohawk Board on June 30, 1971. Nevertheless, there is no question that the idea of such a change was in the air prior to the April 30, 1971 merger. If the District Court had held that it was a material omission for Mohawk not to have disclosed that such a change was under consideration, an interesting question would now be before this Court, since the circumstances under which possible developments must be disclosed are quite different from those under which concrete facts must be disclosed. See Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 568 (E.D.N.Y. 1971).

But that question is not presented here because the District Court erroneously concluded that the decision to change from the one accounting method to the other was made prior to April 30, 1971. The court stated:

> "A day or two following April 22nd, and prior to the [April 30] shareholders' meeting, the certified public accountants approved and recommended the change from the financing method to the operating method. On April 28, 1971, again prior to the meeting, management's decision had crystallized to the point that Mr. Hengen, Mohawk's public relations officer, was asked to draft an outline for the press release to be issued in conjunction with a meeting with security analysts to be held on May 4th. Additional conversations were held between Wells and Hengen between that date and April 30, 1971. The press release, formally issued on May 4, 1971, but prepared prior to April 30th, discloses the intended change in accounting methods.

The change in accounting alone resulted in a restatement of Mohawk's prior fiscal period ending July 31, 1970, by which revenues were decreased 4%, net income was decreased 18%, and net income per share was dropped $.50 from $1.52 to $1.02." (A.953-54; 387 F. Supp. at 1328)

The record, however, does not support the District Court's conclusions. In reaching these conclusions, the court seems to have relied heavily upon plaintiffs' Post-Trial Memorandum. Unfortunately, that Memorandum was inaccurate and, thus, misled the court. For the above-quoted passage from the District Court's opinion contains no less than four critical mistakes of fact or inference:

(a) The Leidesdorf Recommendation

The District Court's statement that, shortly before the April 30, 1971 Atron stockholders' meeting, the Leidesdorf firm "approved and recommended the change from the financing method to the operating method," implies that Leidesdorf initiated and required such change.* In contrast, the record shows that, on or about April 22, 1971, Wells asked Mr. Wise of Leidesdorf what Leidesdorf's attitude would be if Mohawk switched from the financing to the operating method. After consultation with his partners, Wise reported back that given "the state of development in accounting [Mohawk could] account for it either way" (A.165). Wise indicated that he had a personal preference for the operating method and that the accounting profession might eventually

* This finding is apparently derived from a statement on page 16 of plaintiffs' Post-Trial Memorandum that Leidesdorf told Wells "that they both approved of, and recommended, such a change." (A.988) To minimize further confusion, this Court should note that, throughout much of their Post-Trial Memorandum, plaintiffs confuse the operating and the financing methods, and thus have Mohawk switching from the operating to the financing method, the opposite of what actually happened.

reject the financing method, but it is absolutely clear from the record, contrary to the District Court's apparent belief, that Leidesdorf left the choice with Mohawk.

(b) The Status Of Hengen

Contrary to the District Court's statement, Mr. Hengen was not "Mohawk's public relations officer."* Indeed, he held no office of any kind with Mohawk. Hengen was a partner in the public relations firm of Bejan & Hengen, which firm was retained by Mohawk to handle its public relations (A.172). Thus, the implication that Hengen's participation as an "officer" of Mohawk evidenced the "crystalliz[ation]" of Mohawk's intentions is wholly unwarranted.

(c) The Disclosures Of The May 4 Press Release

The court below was also plainly in error in stating that the "press release, formally issued on May 4, 1971, but prepared prior to April 30th, discloses the intended change in accounting methods" from the financing to the operating method.** The press release is part of the record here. What it says is clear. It contains no such "disclosure." The relevant passage reads:

> "Various accounting matters are being reviewed in connection with the change in the fiscal year, Mr. Rifenburgh noted, such as the establishment of reserves for idle model 1100 DATA-RECORDERS, receivables, inventories and the accounting treatment for past sales to third party lessors, a program which is being discontinued." (A.652; Pl. Ex. 22; p. 2.)

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* Plaintiffs' Post-Trial Memorandum, at page 16, ambiguously refers to Hengen as "Mohawk's public relations man." (A.988)

** Plaintiffs' Post-Trial Memorandum states at page 17 that this release, "formally issued on May 4, 1971, discloses the change in Mohawk's method of accounting for sales of leased equipment." (A.989)

Thus, the release says nothing more than that the accounting change was under consideration; it does not say that such change had been decided upon or made.

(d) The Magnitude Of The 1970 Income Restatement

Finally, the court below was equally mistaken in stating:

> "The change in accounting [from the financing to the operating method] alone resulted in a restatement of Mohawk's prior fiscal period ending July 31, 1970, by which . . . net income per share was dropped $.50 from $1.52 to $1.02." (A.954; 387 F. Supp. at 1328)*

The correct figure, clearly set forth in the record, is not $.50, but about one-half that amount, or $.27 (A.611; Pl. Ex. 21 p. 6).

At the time that Mohawk's 1970 income was restated, various other accounting adjustments were made, independent of the change from the financing to operating method. Specifically, Mohawk treated the acquisition of Atron on a "pooling of interest" basis, causing a substantial retroactive write-down of Mohawk's 1970 income because of Atron's loss of over $1 million in 1970 (A.610, 680; Pl. Ex. 21 p. 5; Pl. Ex. 33 p. 9) Plaintiffs' Post-Trial Memorandum obscured the distinction between the $.27 per share income reduction caused by the change in accounting method and the additional $.23 per share reduction caused by the other unrelated adjustments; the District Court also failed to perceive the distinction and, thus, repeated the error.

Accordingly, the District Court's finding that Mohawk decided to make this accounting change prior to the April 30, 1971

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* The $.50 figure was obtained from page 17 of plaintiffs' Post-Trial Memorandum, where it was stated as the net effect of "the change in the manner of accounting for sales of leased equipment." (A.989)

merger rests entirely upon a series of misreadings of the record.

However, even were there a scintilla of evidence to sustain the court's finding, the question would still remain: Was the non-disclosure of an impending change from one legitimate accounting method to another a <u>material</u> omission? We submit that the answer is "no." Reasonable investors -- not to mention these "sophisticated" plaintiffs (A.912; 387 F. Supp. at 1314) -- would perceive that what is involved here is not reality itself, but only the method by which that underlying reality is reported; they would have seen that, upon the change from the financing method, the net income retroactively subtracted from Mohawk's fiscal 1970 earnings would, under the operating method, presumably re-emerge in the income statements of 1971, 1972, 1973, 1974, etc. The court below recognized this obvious point, quoting defendants' expert witness, Harry Rosner:

> "'The profit is still there. It is primarily a question when you record the profit.'" (A.949; 387 F. Supp. at 1326)

With this in mind, can it be said that any reasonable Atron stockholder <u>would</u> have rejected the merger? Again, we submit the answer is "no."

4. <u>Miscellaneous Adjustments</u>

In addition to the three major categories of undisclosed data described above, the District Court's opinion mentions a fourth category in passing. Thus, after discussing the change in accounting methods, the court stated:

> "In addition, other miscellaneous adjustments reducing Mohawk's net income substantially

were not disclosed in the proxy solicitation material, although mentioned in the May 4, 1971 press release." (A.954; 387 F. Supp. at 1328)

It is not clear from the opinion whether the District Court found this to be a fourth category of material omission.

Fortunately, the record is clear where the opinion is not. These "other miscellaneous adjustments" were "mentioned" in the May 4 press release only as possibilities, and nothing more. (See A.652; Pl. Ex. 22 p. 2, quoted on p. 51, supra.) The most substantial of these adjustments was the addition of $2.8 million to Mohawk's reserve for accounts receivable and inventories. But the necessity for any large adjustment to this reserve was not known until about June 15, 1971 -- well after the merger -- when Leidesdorf completed its physical inventory and review of aging of accounts receivable (A.197). And the size of the actual adjustment was a surprise to Mohawk's treasurer, Wells, when he learned of it in June (A.198). The record reveals a similar story as to the other adjustments. (A.199-200)

Thus, when the record facts are squarely confronted, it is apparent that none of the items omitted from the proxy statement add up to very much. No trier of fact could properly find any substantial likelihood that this miscellany of normal business practices and accounting adjustments would have caused a reasonable investor to adopt a different attitude toward the Atron-Mohawk merger.

Indeed, the immateriality of these items is best illustrated by the market's striking indifference to the omitted information when it eventually became public. Specifically,

Mohawk's average closing price in the month of April 1971 was $40.74. On Monday, May 3, it closed at $44-7/8. On May 4, -- the day of the press release which the District Court found disclosed the omitted data -- Mohawk's stock closed at the exact same price, $44-7/8. The next day it "plunged" about $.13 to $44.75. The following week, its average closing price was $42.63 -- $1.89 <u>greater</u> than it had been in April.* Obviously, the market was not much moved by any announcement that Mohawk might change its fiscal year, or abandon the third-party sale method of financing certain equipment, or change the accounting treatment of such sales so as to defer booking their profits. Had the District Court applied the proper standard of materiality, it would have concluded -- as did the market -- that these omissions were not material.

C. <u>In The Context Of Atron's Grave Condition, None Of The "Omitted Data" Was Material</u>

"Materiality" has a subjective as well as an objective aspect; information claimed to be material must also be examined in the context of the actual transaction involved. It must be judged by extrinsic as well as intrinsic standards. See <u>SEC</u> v. <u>Texas Gulf Sulphur Co.</u>, 401 F.2d 833, 849-51 (2d Cir. 1968), <u>cert. denied</u>, 394 U.S. 976 (1969); <u>Chris-Craft Indus., Inc</u>. v. <u>Piper Aircraft Corp.</u>, 480 F.2d 341 (2d Cir.), <u>cert. denied</u>, 414 U.S. 910, 924 (1973); <u>Bragalini</u> v. <u>Biblowitz</u>, ____ F. Supp. _____, CCH Fed. Sec. L. Rep., ¶ 94,371, at 95,268 (S.D.N.Y. 1974), <u>supra</u>.

Thus, while it might be material to a yachtsman whether the lifeboat he is about to buy is rust-proofed, it would <u>not</u> be

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* See Table B3 hereto.

material to that yachtsman -- even under the District Court's definition of materiality -- when, as a drowning man, he is offered rescue by the lifeboat. In this case, it is indisputable that Atron, too, was about to go under, and that a merger with Mohawk was the only rescue in sight. This is the truly material fact. In this context, it is clear that no reasonable Atron stockholder would have rejected the merger.

We urge this Court to observe just how grim was Atron's situation in April 1971:

Item: In its first full fiscal year, ending September 30, 1970, Atron had lost \$1,087,304, or \$1.10 per share, upon total operating revenues of only \$895,483 (A.561; Pl. Exh. 18 p. 12). Atron lost an additional \$.13 per share in the quarter ending December 31, 1970 (Id.).

Item: Ninety percent of Atron's revenues came from its sales to Mohawk (Id.). Mohawk had the contractual right to take over manufacture of Atron's principal product and, on January 29, 1971, Mohawk informed Atron that it intended to exercise that right. (A.420)

Item: Atron was continuing to spend its remaining cash at the rate of some \$200,000 per month (A.442, 453). As a result, its working capital was being enormously reduced by its operating losses. Atron did not have the financial resources to continue operating for very long without Mohawk's patronage (A.783-84, 311-12; Def. Ex. V)

Under these circumstances, no corporation other than Mohawk showed interest in acquiring Atron. Liquidation would have been Atron's only realistic alternative but for the merger with

Mohawk. And, at best, an Atron stockholder, as we have seen, could hope to obtain no more than a $3-4 per share upon liquidation. (See p. 14, supra.)

Mohawk's exchange offer, of course, was worth substantially more than $3-4 on any theory, including the District Court's. (See pp. 19-27, supra.) Indeed, the value of the Mohawk offer increased markedly between the time it was first made on January 29, 1971 and the actual merger on April 30, 1971. On January 29, Mohawk stock closed at $29. By April 30, its market price had increased by more than 50%, and it closed at $44.50. (See Table B3 hereto.) Even if Mohawk had then known that it would later restate its 1970 per share income downward by $.27 (or 18%) as a result of switching to the operating method of accounting for third party sales, and even if the market price of Mohawk stock on April 30 had declined by a similar percentage,* Mohawk stock would still have been worth $36.94 on April 30, 1971 --or 27% more than it had been worth on January 29, 1971.

Thus, the conclusion is inescapable that any reasonable Atron stockhold would have rushed to accept Mohawk's merger offer even if plaintiffs' complaint had been stapled to the proxy

---

* However, there is no reason even to believe that the disclosure of the omitted information would have had any so substantial a negative impact upon the market for Mohawk stock. The District Court found no such nexus:

> "I decline to find that the changes in accounting methods or the discontinuance of third-party sales or any combination of such events, was the cause in the decline in price of Mohawk stock between May 3, 1971 and August 25, 1971, the date of filing of the Registration Statement." (A.958; 387 F. Supp. at 1330).

And, all the evidence of actual market action in Mohawk stock confirms the correctness of the District Court's finding on this score. See p. 55, supra.

statement. There was no other viable way to salvage his investment. Survival is the ultimate material issue.

POINT III

THE DISTRICT COURT ERRED IN HOLDING THAT RELIANCE WAS NOT AN ISSUE IN THIS CASE; THE EVIDENCE SHOWS THAT PLAINTIFFS WOULD HAVE ACTED NO DIFFERENTLY HAD THE OMITTED INFORMATION BEEN DISCLOSED

It was a central aspect of the defense below that the information omitted from the proxy statement was irrelevant to these plaintiffs, who would have acted no differently in any event. No matter how a hypothetical "reasonable investor" might have viewed the omitted data, the six sophisticated plaintiffs who commenced this action would not have wavered one inch in their support of the merger. These professional investors knew that the omitted data was of little real intrinsic significance, especially in view of Atron's financial plight and the urgency with which these investors wanted to convert their holdings in a small, failing company into something of more certain value, to wit, Mohawk stock.

But the District Court refused even to consider this aspect of defendants' case, apparently believing that, in an "omission" case under Section 14(a), such "reliance" is either (1) no longer an element of the action or (2) irrebuttably presumed from proof of materiality. Citing the Mills and Affiliated Ute cases (see p. 42, supra), the District Court simply glossed over the reliance issue, stating:

> "No proof of reliance is necessary in an omission case. . . ." (A.955; 387 F. Supp. at 1329)

In so holding, the court misconstrued both Mills and Affiliated Ute.

Of greater significance, it ignored clear proof that the omissions involved here were of absolutely no concern to these plaintiffs -- proof that requires a judgment for defendants.

A. Reliance Should Have Been Considered An Element Of The Case

The Mills and Affiliated Ute cases did not eliminate proof of reliance in omission cases under the 1934 Act. They merely modified the evidentiary rules with regard to such proof. Both cases (unlike this case) were class actions in which there was no practical way to bring all parties before the court to prove their reliance. Thus, as this Court has carefully pointed out, the Mills case

> ". . . established the presumption of reasonable reliance in order to avoid an overly difficult burden of proof. This was to encourage vigorous enforcement of the securities laws through shareholder suits, and to effectuate the congressional purpose of enabling shareholders to make informed decisions 'by resolving doubts in favor of those the statute is designed to protect'." Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 374 (2d Cir. 1973), supra (emphasis supplied).

By virtue of this "presumption", plaintiff in a Section 14(a) omission case need not plead or initiate proof of reliance. See Competitive Associates, Inc. v. Laventhol, Krekstein, Horwath & Horwath, No. 74-2048 (2d Cir. May 8, 1975). However, once reliance has been put in issue, it very much remains in issue, and must be resolved, like any other issue, on the basis of the evidence taken as a whole. See Shapiro v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 239 (2d Cir. 1974); Jackson v. Oppenheimer, ____ F. Supp. ____, CCH Fed. Sec. L. Rep., ¶ 94,894,

at 97,040 (S.D.N.Y. 1974); also, Rochez Bros. v. Rhoades, 491 F.2d 402, 410 (3rd Cir. 1974).

Neither "reliance" nor "materiality" is specifically prescribed as an element of a claim under the 1934 Act. The two terms have developed from the case law as intertwined aspects of the overriding element of causation. "Materiality" provides one objective test of causation; "reliance" provides a subjective foil. As this Court has stated, "[t]he materiality test is concerned only with whether a prototype reasonable investor would have relied." Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 363 (2d Cir. 1973), supra (emphasis supplied). The reliance test, we can add, is concerned with whether the actual plaintiff-investor did in fact rely.

Thus, recovery under Section 14(a) is unauthorized where plaintiffs knew of the omitted information before they cast their merger votes, or where they were indifferent to the undisclosed data, just as it is improper where the omitted facts were objectively unimportant. In either event, the conduct proscribed by the statute -- the omission of facts -- is not a cognizable cause of injury to plaintiffs. And, in this case, typical of many others which confront this Court, the reliance requirement is a necessary safeguard to prevent sophisticated investors such as plaintiffs from enhancing their merger gains on the basis of selective hindsight about insignificant business practices or technical accounting matters.

Further, under the circumstances of this case, the burden of proof on the issue of reliance should have rested upon

plaintiffs. Rule 301 of the new Federal Rules of Evidence suggests that the presumption authorized by Mills should have had no effect upon the burden of proof.

> "[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." (Emphasis supplied)

As explained by the report of the Congressional Conference Committee:

> ". . . a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may presume the existence of the presumed fact from proof of the basic facts. Conf. Comm. Notes, House Report No. 93-1597, 93rd Cong., 2d Sess. (1974) (emphasis supplied)

Thus, once defendants below introduced any evidence tending to prove that the plaintiffs did not rely upon the omissions which they now complain, the effect of the Mills presumption should have been eliminated, leaving plaintiffs with, perhaps, a slim inference, but also with the burden of proof. In any event, wherever the burden of proof on reliance should have rested, the critical fact is that defendants here were not even given the opportunity to prove their point because the court below, at the outset, wrote off reliance as an element in the case under any circumstances. We submit this was error.

B. The District Court's Error Was Prejudicial

There was substantial direct and indirect evidence at trial tending to show that these specific plaintiffs would have

acted no differently had all the omitted information been disclosed in the proxy statement. Had the District Court thought itself free to consider this evidence, it would have found that plaintiffs did not rely on, and so were not injured by, the alleged omissions. At a minimum, defendants were wrongly denied a judicial consideration of this aspect of the case.

In the factual context that obtained at the time of the merger, these sophisticated plaintiffs, whom the court below found to be "experienced and knowledgeable investors" (A.912; 387 F. Supp. at 1314) would have disregarded the undisclosed data as trivial. Indeed, with respect to the most significant of the changes -- the switch from the financing method to the operating method of accounting for third party sales of leased equipment -- these individuals would have perceived that, in the long run, such a change was, if anything, advantageous to Mohawk.

Thus, O. Seaburn Eaton, a securities analyst who attended the May 4, 1971 security analysts' meeting with Mohawk's representatives, testified at trial as to his reaction to the decision by Mohawk to treat the leased machines so sold as rental equipment:

> "A. It meant that the revenues from previously sold equipment, the rental revenues from that equipment would now come into Mohawk's reported revenue and earnings stream. Otherwise it would not have.
>
> Q. Was that a plus or minus factor in your mind as an analyst?
>
> A. Oh, plus." (A.372-73)

We submit that these sophisticated plaintiffs' perception of the change would have been exactly the same as Mr. Eaton's -- it was a "plus". It provided, in effect, a legitimate way for Mohawk to

have eaten its revenue cake (in 1970) and to have it too (in later years).

Moreover, plaintiffs acknowledged at trial that virtually their sole interest in the merger of Atron with Mohawk was the fact that they would receive Mohawk stock which (even if restricted) was considerably more liquid than the lettered, thinly traded Atron stock with which they were saddled. As plaintiff LeLandais testified, he

> ". . . was in favor of a merger only for one reason and that [was] to provide a way for my stockholders to get out [of Atron]." (A.284)

All these plaintiffs, understandably, wanted out of an investment in Atron which was turning sour under their noses. (<u>E.g.</u>, A.87, 698-700); Pl. Ex. 35 pp. 23-25.) And, as we have seen, merger with Mohawk was the only way out -- no matter what additional data about Mohawk of the sort involved here might have been disclosed.

In addition, there was direct evidence out of plaintiffs' own mouths which negates any notion of reliance. Irwin R. Le Pow, the general partner of plaintiff Creative Capital Fund, was asked on direct examination whether he would have voted differently on the merger had he known about Mohawk's eventual restatement of income before the April 30 meeting. He replied, with commendable candor,

> "The answer is, <u>I don't know</u>." (A.98; emphasis supplied)

Harvey Wertheim, vice president and treasurer of plaintiff Research and Science Investors, Inc., was asked a similar question. He, too, was unwilling to swear that such tangential data would

have mattered to him. He was able to summon up only the most minimal response: "It could have" (A. 224).

The inability of Wertheim and Le Pow, even in the middle of the trial and with knowledge that it was desirable for them to claim reliance upon the omissions from the proxy statement, to swear that the omitted data was important to them, fatally undercuts the theory of their lawsuit, i.e., that they were misled.

Plaintiff Pierre J. LeLandais is a somewhat different story. When examined two days after Le Pow and Wertheim, he was prepared to testify that the Mohawk accounting adjustments mattered to him (A.272). But this same plaintiff had also testified about a telephone conversation with Joseph S. Stoutenburgh, president of Atron, on April 19, 1971, in which Stoutenburgh allegedly assured LeLandais that the holders of restricted Atron stock would receive unrestricted Mohawk stock. As to this LeLandais testimony, the District Court found that Mr. LeLandais was, to put it charitably, imagining things:

> "The Court finds this testimony incredible. Plaintiffs have not proved to my satisfaction that the conversation with Stoutenburgh took place as claimed." (A.933; 387 F. Supp. at 1321)

Defendants can only wonder how much weight the District Court would have given this unreliable witness' self-serving protestations of reliance had the court felt free to consider reliance as a relevant issue.

At the very least, we submit, defendants are entitled to know the answer. This Court, we say, should determine on the record here that plaintiffs did not prove the necessary causal

link between defendants' alleged omissions and plaintiffs' actions. Thus, the Court should reverse the decision below on this ground. At a minimum, it should remand the case with instructions to the District Court to consider the issue.

CONCLUSION

Defendants submit that plaintiffs suffered no injury as a result of the omission of any information from the April 16, 1971 proxy statement (1) because plaintiffs did not in fact rely in any sense upon the apparent state of facts occasioned by the omission of the information in question, (2) because such information was simply not material, and (3) because, in any event, plaintiffs sustained no damage by reason of the relevant transactions. For these reasons, the judgment below should be reversed and the amended complaint dismissed.

Alternatively, at a minimum, the case should be remanded with instructions to the District Court (A) to reassess the facts in light of a proper standard of materiality, (B) to evaluate the evidence as to whether the omitted information, even if material, was in fact of any relevance to plaintiffs here and (C) if necessary, to recalculate plaintiffs' actual resulting damages, if any.

Dated: New York, New York
May 23, 1975

Respectfully submitted,

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ISL

DAILY STOCK PRICE INDEX

NEW YORK STOCK EXCHANGE

1971

July August September

TABLE B1

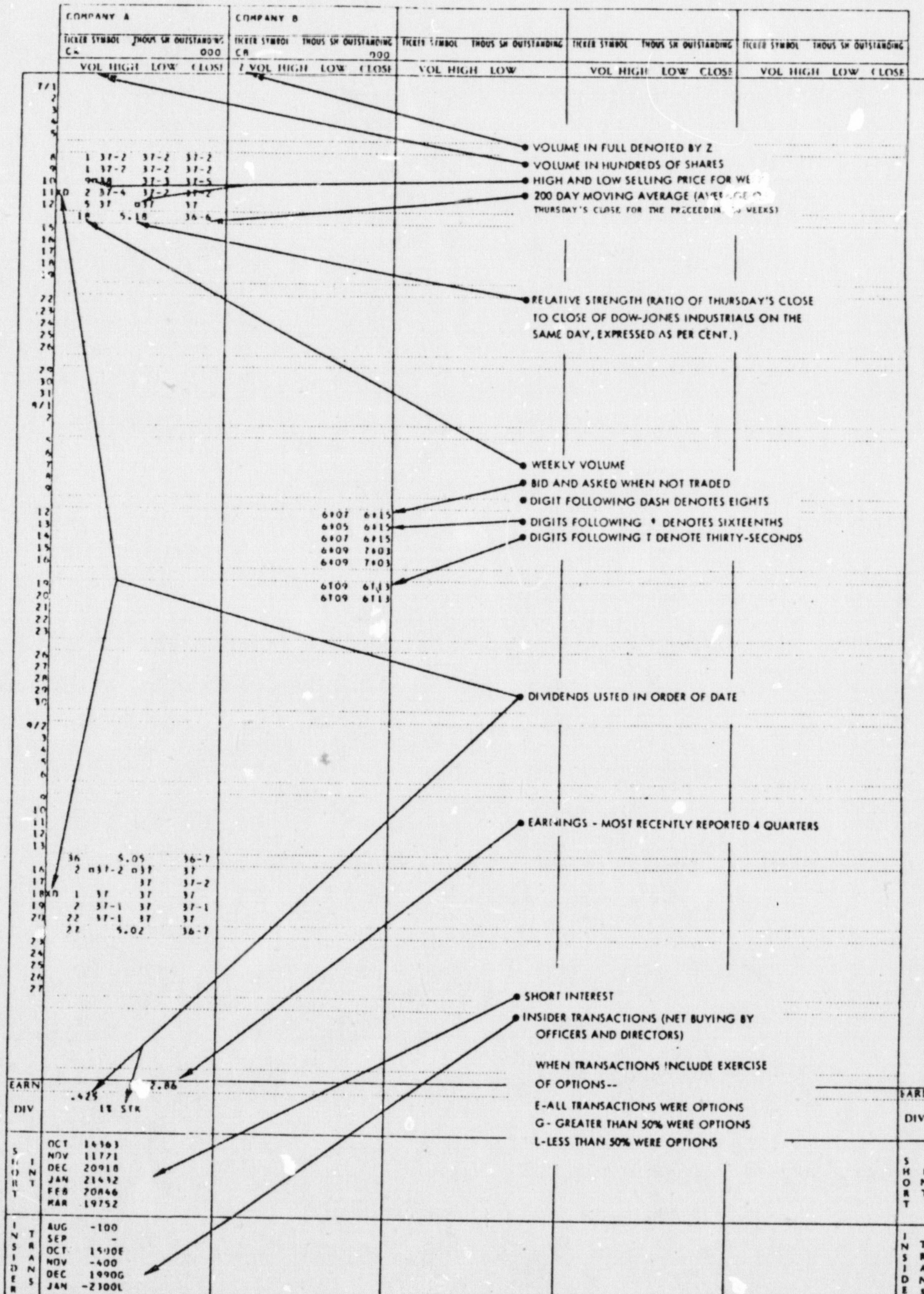
COMPANY A
COMPANY B
TICKER SYMBOL THOUS SH OUTSTANDING
VOL HIGH LOW CLOSE
VOLUME IN FULL DENOTED BY Z
VOLUME IN HUNDREDS OF SHARES
HIGH AND LOW SELLING PRICE FOR WEEK
200 DAY MOVING AVERAGE
RELATIVE STRENGTH (RATIO OF THURSDAY'S CLOSE TO CLOSE OF DOW-JONES INDUSTRIALS ON THE SAME DAY, EXPRESSED AS PER CENT.)
WEEKLY VOLUME
BID AND ASKED WHEN NOT TRADED
DIGIT FOLLOWING DASH DENOTES EIGHTS
DIGITS FOLLOWING + DENOTES SIXTEENTHS
DIGITS FOLLOWING T DENOTE THIRTY-SECONDS
DIVIDENDS LISTED IN ORDER OF DATE
EARNINGS - MOST RECENTLY REPORTED 4 QUARTERS
SHORT INTEREST
INSIDER TRANSACTIONS (NET BUYING BY OFFICERS AND DIRECTORS)
WHEN TRANSACTIONS INCLUDE EXERCISE OF OPTIONS--
E-ALL TRANSACTIONS WERE OPTIONS
G- GREATER THAN 50% WERE OPTIONS
L-LESS THAN 50% WERE OPTIONS
EARN
DIV
SHORT INT
INSIDER TRANS
OCT 14363
NOV 11771
DEC 20918
JAN 21432
FEB 20846
MAR 19752
AUG -100
SEP -
OCT 1590E
NOV -400
DEC 1990G
JAN -2300L

TABLE B2

MOHAWK DATA SCIENCES

TICKER SYMBOL MDS — THOUS SH OUTSTANDING 5814

DATE	VOL	HIGH	LOW	CLOSE
1/1	HOLIDAY			
			3.14	27-1
4	40a	25-4	25	26
5	135	26-4	25-6	26
6	111	26-2	24-5	24-5
7	117	24-6	24-1	24-1
8	226	24-2a	23-2	23-2
	569		2.87	26-6
11	119	23-6a	23-1	23-6
12	531	24-5	23-4	24-4
13	91	25-7	25-2	25-5
14	105	25-6	25-2	25-5
15	182a	26-2	24-4	24-5
	1027		3.03	26-5
18	96	25	24-1	24-5
19	125	24-6a	24	24-2
20	92	24-3	24	24
21	238	25-5	24-1	25-1
22	586a	27-1	25-4	27-1
	1187		2.96	26-3
25	170	29-1a	27	29-2
26	111	29-1	28-2	28-7
27	469a	29-4	28-2	29-1
28	74	29-1	28-5	29
29	117	29-4	29	29
	1169		3.15	[illegible]
2/1	299	31-1a	29-1	31-1
2	293a	32-1	30-6	[illegible]
3	201	31	29-5	30-6
4	245	31-6	29-6	30-7
5	144	31-7	30-5	31-2
	1190		3.52	26-6
8	151	31-7	30-6	31-4
9	271a	32-4	31-4	31-5
10	338	31-4a	29-6	30-4
11	224	30-6	29-6	29-6
12	114	30-3	29-6	30
	1072		3.36	27
15	HOLIDAY			
16	521	31	29-4	31
17	220a	31-3	[illegible]	30-2
18	167	30-1	29-5	29-7
19	134	29-6a	28-1	28-6
	1094		3.17	27-2
22	127	28-6a	28	28-2
23	77	29-5	28-2	29-3
24	453a	30-5	29-2	30-3
25	146	30-5	29-5	30
26	112	29-6	29-1	29-5
	915		3.40	27-4
3/1	67	30-4a	29-5	30-4
2	302	31-1	30-5	31
3	170	31-5	31	31-2
4	521	31-4	31-3	33
5	518a	34-3	33-2	34-1
	1580		3.70	29
8	579a	34-4	32-1	[illegible]
9	255	33-6	32-4	32-5
10	104	33-2a	32-2	32-7
11	687	34-3	32-5	34-2
12	435	34-3	33-2	34-3
	2061		3.80	28-4
15	764	36-4a	34-3	36-4
16	559a	37-1	35-4	35-6
17	230	35	34-6	36
18	142	36-3	35-5	35-5
19	101	35-5	35-1	35-1
	1796		3.88	29
22	281	35a	34-1	34-7
23	225	35-4	34-6	35-3
24	308a	36-1	35-1	35-4
	273	35-6	34-7	35-6
	115	36	35-5	35-6
	1224		3.96	29-4
29	358a	35-6	35-1	35-1
30	96	35-3	34-5	34-7
31	133	35-5a	34-3	35-1

EARN $ 1.25

DIV

SHORT INT			
APR	42239	OCT	27361
MAY	26807	NOV	35591
JUN	87756	DEC	66511
JUL	62947	JAN	54398
AUG	48346	FEB	67679
SEP	56826	MAR	-

INSIDER TRANS			
FEB	-1000	AUG	-
MAR	-1600	SEP	-8700
APR	-1400	OCT	-
MAY	-	NOV	-
JUN	-27000	DEC	-5000
JUL	-	JAN	-

ISL INDEX 1ST QTR 1971

MOHAWK DATA SCIENCES

TICKER SYMBOL MDS — THOUS SH OUTSTANDING 5789

DATE	VOL	HIGH	LOW	CLOSE
4/1	91	35-6a	35	35-6
2	794a	37-3	35-5	36-4
	885		3.95	30-2
5	475a	38-4a	37	37-5
6	357	38-2	37-5	37-7
7	684	38-2	37	37-2
8	293	38	37-3	37-6
9	HOLIDAY			
	1809		4.10	30-5
12	907	40-5a	37-6	40-5
13	244a	40-7	39-5	39-5
14	219	40-3	39-[illegible]	40-1
15	179	40-2	39-4	39-4
16	534	39-7	38-6	39-6
	2083		4.21	30-6
19	375	40-6	39-6	40-4
20	597	40-5	39-7	39-7
21	161	40-5a	39-5	40-1
22	253	40-5	39-5	40-5
23	630a	44-4	40-7	44-1
	2016		4.31	31
26	856	46-7	44-7	45-6
27	1284a	47-3	45-6	47
28	214	47-2	44-1	45-4
29	116	45-5	44-5	45
30	164	45a	44	44-5
	2634		4.74	31-2
5/3	341	44-7	43-7	44-7
4	73	45-2	43	44-7
5	396	44-6	43	44-6
6	286	44-7a	41-4	42-4
7	246	42-4	41-5	42-4
	2006		4.53	31-3
10	217a	44	42-2	43-6
11	131	43-5	42-6	42-7
12	140	42-6	42	42-5
13	371	43-3	42-2	42-4
14	171	42-2a	41	41-3
	1030		4.53	31-5
17	220a	40-4	38-7	39-4
18	173	40-3a	38-6	39-1
19	84	40-4	39	39-6
20	88	40-3	39-4	40-2
21	60	40-3	39-1	39-4
	625		4.35	31-7
24	124a	39-7	38-5	38-6
25	335	39	38-2	38-4
26	401	39-6	38-4	39-2
27	69	39-2	38-5	39-2
28	314	39a	37-4	38-6
	1243		4.33	32-1
31	HOLIDAY			
6/1	424	39-4a	38-4	39-4
2	730	41-5	39-7	41-5
3	884a	42-4	41	41
4	262	41-2	40-3	41
	2300		4.45	32-4
7	318a	[illegible]	39-3	39-5
8	1244	[illegible]	39	39-1
9	318	39-5	38-5	39-4
10	123	39-6	38-5	38-7
11	136	39-3a	38-4	39-3
	2139		4.24	32-7
14	208	39-2	38-3	38-4
15	409	39	38	38-7
16	397	39-5	39	39-3
17	145a	40	39	39-2
18	347	39-3a	34-4	35-3
	1506		4.33	33-3
21	316a	35-7	34-1	34-4
22	217	35-4	34-4	34-4
23	205	35-6	35	35
24	159	35	34	34
25	80	34-1a	33-2	33-4
	977		3.87	33-5
28	43	34-3a	33-5	34-2
29	120	35-2	34-5	35-2
30	271a	36	35	35

EARN $ 1.25

DIV

SHORT INT			
JUL	62947	JAN	54398
AUG	48346	FEB	67679
SEP	56826	MAR	57166
OCT	27361	APR	16411
NOV	35591	MAY	31175
DEC	66511	JUN	-

INSIDER TRANS			
MAY	-	NOV	-
JUN	-27000	DEC	-5000
JUL	-	JAN	-
AUG	-	FEB	-
SEP	-8700	MAR	-
OCT	-	APR	-

ISL INDEX 2ND QTR 1971

MOHAWK DATA SCIENCES

TICKER SYMBOL MDS — THOUS SH OUTSTANDING 5789

DATE	VOL	HIGH	LOW	CLOSE
7/1	127a	36-1	35	35
2	67	35a	34-4	35
	194		3.91	34
5	HOLIDAY			
6	77a	34-6	33-6	34
7	298	34-1	32-6	33-2
8	951	32-2a	29	29
9	561	31-2	29-6	29-6
	1887		3.21	34
12	372a	29-7	27-1	27-4
13	852	27-4a	25-4	25-6
14	578	27-4	25-6	27-4
15	489	28-2	26	26-3
16	256	27-3	25-5	25-6
	2547		2.96	34
19	148	25-6	25-6	26-6
20	150a	27-3	26-4	26-4
21	160	27-1	26-4	26-6
22	65	26-6	26	26
23	146	26a	25	25-4
	673		2.93	34-1
26	464	26	25-2	25-4
27	66	25-5	25-2	25-3
28	163	25a	25	25-4
29	249a	26-2	25-2	25-5
30	65	26-2	25-5	25-6
	1007		2.97	34-1
8/2	177a	26-4	25-4	25-6
3	95	25-7	25	25
4	489	25-2	22-3	22-3
5	163	22-7	22-2	22-2
6	164	22-6a	22	22-3
	1287		2.61	34
9	327	22-7a	21-4	21-6
10	271	22-6	21-4	22-6
11	532	25	23	24-6
12	263a	25-6	25-1	25-4
13	156	25-6	24-6	24-7
	1593		2.96	34
16	901	27-7	26-4	26-6
17	390	27-6a	26-1	27-6
18	286a	28	26-6	27
19	279	27-3	26-6	26-6
20	57	27	26-4	26-6
	1913		3.03	34
23	152	27-4a	27	27-1
24	241	27-3	27	[illegible]
25	566a	29	27-6	29-1
26	354	28-5	27-6	29-2
27	200	29	28-3	28-6
	1511		3.11	34-1
30	167a	29	28	28-2
31	92	28-1	27-5	27-6
9/1	212	27-7a	26	25-1
2	290	27-7	26-7	27-4
3	253	28-5	27-4	28-5
	1004		3.05	34-1
6	HOLIDAY			
7	218a	29-3	28-4	28-4
8	358	28-4	27-6	27-6
9	83	28	27-2	27-3
10	160	27-2a	26-1	26-7
	819		2.98	34
13	39a	26-7	26-3	26-5
14	57	26-6	26-1	26-1
15	64	26-2	25-6	25-7
16	207	25-5	24-4	24-7
17	68	24-7a	24-2	24-7
	815		2.75	33-6
20	100a	24-6	24-2	24-2
21	137	24-1	22-1	22-6
22	126	23-5	22-3	22-4
23	209	23-4a	22	21-2
24	155	24	23	23-4
	787		2.60	31-5
27	86	23-4a	22-5	21-4
28	107a	24	22-7	22-7
29	47	23-2	22-6	23-1
30	162	23-7	21	23-2

EARN DEFICITS .00

DIV

SHORT INT			
OCT	27361	APR	16411
NOV	35591	MAY	31175
DEC	66511	JUN	18520
JAN	54398	JUL	-
FEB	67679	AUG	-
MAR	57166	SEP	-

INSIDER TRANS			
AUG	-	FEB	-
SEP	-8700	MAR	-200
OCT	-	APR	-3100
NOV	-	MAY	-576
DEC	-5000	JUN	-
JAN	-	JUL	-

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TABLE B3

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